IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

Supreme Court, U.S.
FILED
FEB 28 1972
E. ROBERT SEAVER, CLERK

MELVIN R. LAIRD, Secretary of Defense, *et al.*,
Petitioners,

—v.—

ARLO TATUM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

FRANK ASKIN
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Respondents

INDEX

PAGE

Question Presented 1

Statement of the Case 2

1. Proceedings in the courts below 3

2. Plaintiffs' unchallenged allegations which must be broadly construed and accepted as true in face of the government's motion to dismiss 4

3. Events subsequent to the proceedings in the District Court of which the Court should take notice for the sole purpose of determining the justiciability of plaintiffs' claims 14

Summary of Argument 21

ARGUMENT

Introduction 26

I. Plaintiffs' Claims Are Justiciable and Ripe for Adjudication 31

A. Plaintiffs' Claims Meet the Requirement of "Immediacy and Reality" and Are Ripe for Adjudication 31

B. The Present Inhibiting Effect on the Exercise of First Amendment Rights Creates a Justiciable Controversy 39

PAGE

1. This Court has often taken notice of the chilling effect upon free speech and association caused by overbroad governmental activities 43

2. Social science data supports the Court's recognition of the chilling effect of overbroad governmental programs 56

3. Plaintiffs are, at a minimum, entitled to a hearing on the existence of chilling effect, since the Court may not judicially notice the absence of chill at this stage of the proceedings 59

C. Plaintiffs Assert Justiciable Claims of Invasion of Privacy 61

II. The Justiciability of Plaintiffs' Claims Is Enhanced Because the Military Has Exceeded Its Constitutional and Statutory Authority and Intruded Into Civilian Affairs 66

A. This Court should not "stay its hand" and avoid deciding that plaintiffs' ultra vires claims are justiciable 66

B. The statutes cited by the government do not authorize political surveillance by the Army 68

C. Any military action relating to civilians is subject to judicial review 71

PAGE

III. Plaintiffs Have Standing to Adjudicate These Claims—if Indeed the Question of Plaintiffs' Standing Is Properly Before This Court 76

A. The issue of plaintiffs' standing was not raised in the courts below 76

B. Plaintiff individuals and organizations have standing to assert both their claims and the claims of others similarly situated 79

1. There is a logical nexus between the plaintiffs' status and the First Amendment issues they seek to adjudicate 80

2. Plaintiffs allege injury in fact and are within the zone of interest protected by the constitutional guarantees they seek to enforce 81

IV. This Case Cannot Be Mooted by the Army's Assertion That Its Domestic Surveillance Activity Has Been Reduced 88

CONCLUSION 92

APPENDIX—

Chilling Effect: A View From the Social Sciences 1a

PAGE

Authorities Cited

Cases:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1971) 78
Afro-American Publishing Co. v. Jaffee, 366 F.2d 649 (D.C. Cir. 1966) 63
Alabama v. United States, 373 U.S. 545 (1963) 68
Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945) 33
Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970) 80, 82
ACLU v. Westmoreland, 70 Civ. 3191 (N.D. Ill., 1970), *appeal argued sub nom.* ACLU v. Laird, 71-1159 (7th Cir. 1972) 15, 16, 20, 22, 36
American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) 87
Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970), *rev'g* 106 N.J. Super. 545 (Ch. Div. 1969) 22, 24, 36, 40, 84, 85, 86, 87
Aronson v. Giarusso, 436 F.2d 955 (5th Cir. 1971) 36
Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970) 25, 39, 82
Avirgan v. Rizzo, 70 Civ. 477 (E.D. Pa. 1970) 37

Baggett v. Bullitt, 377 U.S. 360 (1964) 22, 40, 41, 53, 82
Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) 56
Baird v. State Bar of Arizona, 401 U.S. 1 (1971) 40, 41, 46
Baker v. Carr, 369 U.S. 186 (1962) 22, 34, 35, 79
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 48
Barlow v. Collins, 397 U.S. 159 (1970) 82
Bates v. City of Little Rock, 361 U.S. 516 (1960) 30, 46, 65, 69-70, 81, 85, 86, 87

PAGE

Bee See Books v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968) 55
Brown v. Board of Education, 347 U.S. 483 (1954) 15, 56, 57

California Motor Transport v. Trucking Unlimited, 40 U.S.L.W. 4153 (January 13, 1972) 9
Carolene Products Co. v. United States, 323 U.S. 18 (1944) 15
Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966) 19
Charge to the Grand Jury, In re, 62 F. 828 (D. Ill. 1894) 68, 70
Cole v. Young, 351 U.S. 536 (1955) 71
Conley v. Gibson, 355 U.S. 41 (1957) 9
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 30, 61, 62, 66
Council of Organization on Philadelphia Police Accountability and Responsibility v. Tate (E.D. Pa., Civ. No. 70-2430) 37
Cramp v. Board of Instruction, 368 U.S. 278 (1961) 53

Davis v. Ichord, 442 F.2d 1207 (D.C. Cir. 1970) 88
DeGregory v. Attorney General, 383 U.S. 825 (1966) 40, 41
Division 1287 of Street Elec. Ry. & Motor Coach Employees of America v. Missouri, 374 U.S. 74 (1963) 91
Dombrowski v. Pfister, 380 U.S. 479 (1965) 22, 24, 37, 40, 54, 82, 85
DuBois Club v. Clark, 389 U.S. 309 (1967) 39, 85
Duncan v. Kahanamoku, 327 U.S. 304 (1946) 72, 73

PAGE

Edwards v. South Carolina, 372 U.S. 229 (1963) 81
Elfbrandt v. Russell, 384 U.S. 11 (1966) 40, 41
Elliott v. Home Loan Bank Board, 233 F. Supp. 578 (N.D. Cal.), *rev'd on other gds.*, 386 F.2d 42 (9th Cir. 1964), *cert. denied*, 390 U.S. 1011 (1965) 15
Evers v. Dwyer, 358 U.S. 202 (1958) 22, 34, 35

Fifth Avenue Peace Parade Committee v. Hoover, 70 Civ. 2646 (S.D.N.Y. February 9, 1972) 36
Flast v. Cohen, 392 U.S. 83 (1968) 21, 25, 28, 32, 34, 35, 39, 77, 78, 79, 80, 81, 82

Freedman v. Maryland, 380 U.S. 51 (1965) 49, 86
Furniture Workers Local 309 v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) 40, 55

Giancana v. Johnson, 335 F.2d 306 (7th Cir. 1964) 62, 63
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) 40, 41, 47, 65
Golden v. Zwickler, 394 U.S. 103 (1969) 38
Griswold v. Connecticut, 381 U.S. 479 (1965) 62

Hague v. CIO, 307 U.S. 496 (1939) 37
Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968) 87
Harmon v. Brucker, 355 U.S. 579 (1958) 72
Heilberg v. Fixa, 236 F. Supp. 405 (N.D. Cal. 1964), *aff'd sub nom.* Lamont v. Postmaster General, 381 U.S. 301 (1965) 40, 41, 50, 51, 82
Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. Cir. 1965) 40
Herndon v. Lowry, 301 U.S. 242 (1937) 70

PAGE

Holmes v. Church, 70 Civ. 5691 (S.D.N.Y. June 14, 1971) 36
Home Building and Loan Association v. Blaisdell, 290 U.S. 938 (1934) 74

Investment Company v. Camp, 400 U.S. 45 (1971) 87

Jenkins v. McKeithen, 395 U.S. 411 (1969) 9, 79
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 9, 38, 87

Katz v. United States, 389 U.S. 347 (1967) 62, 65
Katzenbach v. McClung, 379 U.S. 294 (1964) 33
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 23, 30, 40, 41, 53
Kirk v. United States, 232 F.2d 763 (9th Cir. 1956) 15
Konigsberg v. State Bar, 366 U.S. 36 (1961) 45, 46
Kowall v. United States, 9 Cr. L. Rep. 2482 (W.D. Mich., 1971) 65

Lankford v. Gelston, 364 F.2d 197 (4th Cir., 1966) 37
Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) 35, 40, 42, 60, 83
Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) 36, 37
Lopez v. United States, 373 U.S. 427 (1963) 30
Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961) 47, 87

Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803) 27, 68
Maryland Casualty Co. v. Pacific Oil Co., 312 U.S. 270 (1941) 38

PAGE

Menard v. Mitchell, 430 F.2d 486 (1970), *on remand*, 328 F. Supp. 718 (D.D.C. 1971) 64
Merryman, Ex Parte, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861) 74
Milligan, Ex Parte, 71 U.S. (4 Wall.) 2 (1866) 26, 72, 73, 74
Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) 64
Muller v. Oregon, 208 U.S. 412 (1908) 57

Nader v. General Motors Corp., 24 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970) 63
NAACP v. Alabama, 357 U.S. 449 (1958) 25, 40, 41, 44, 46, 65, 70, 84, 85, 86, 87
NAACP v. Button, 371 U.S. 415 (1963) 37, 40, 54, 85
National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) 55
National Student Association v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969) 39, 40, 42, 79, 82, 88,
New York Times v. Sullivan, 376 U.S. 254 (1964) 48-49
New York Times v. United States, 403 U.S. 713 27

O'Callahan v. Parker, 395 U.S. 258 (1969) 71, 74
Olmstead v. United States, 277 U.S. 438 (1928) 62
Osborn v. United States, 385 U.S. 323 (1966) 30

Parke-Davis Co. v. H. K. Mulford Co., 189 F. 95 (C.C. S.D.N.Y. 1911) 56
Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970) 15
Poe v. Ullman, 367 U.S. 497 (1961) 34, 78
Powell v. McCormack, 395 U.S. 486 (1969) 27, 36

PAGE

Powell v. Texas, 392 U.S. 514 (1968) 56
Presser v. Illinois, 116 U.S. 252 (1886) 68, 71
Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 35-36, 62

Raymond v. Thomas, 91 U.S. 712 (1875) 72
Reed Enterprises v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965) 40
Reid v. Covert, 354 U.S. 1 (1957) 74
Reynolds v. Sims, 377 U.S. 533 (1964) 27, 38
Robinson v. California, 370 U.S. 660 (1962) 56

SEC v. Rapp, 304 F.2d 786 (2d Cir. 1962) 15
Schneider v. Smith, 390 U.S. 17 (1968) 29, 70
Shelton v. Tucker, 364 U.S. 479 (1960) 45, 86
Shull v. Pilot Life Ins. Co., 313 F.2d 445 (5th Cir. 1963) 9
Shuttlesworth v. Birmingham, 383 U.S. 87 (1965) 29
Smith v. California, 361 U.S. 147 (1959) 48
Southern Pacific Railroad v. Conway, 115 F.2d 746 (9th Cir. 1940) 19
Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911) 91
Speiser v. Randall, 357 U.S. 513 (1958) 40, 41, 52
Sterling v. Constantin, 287 U.S. 378 (1932) 72, 74
Straut v. Calissi, 293 F. Supp. 1339 (D. N.J. 1968) 40, 85, 86
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 25, 40, 41, 47, 81, 86

Talley v. California, 362 U.S. 60 (1960) 40, 41, 49, 50, 82
Thornhill v. Alabama, 310 U.S. 88 (1940) 86
Toth v. Quarles, 350 U.S. 11 (1955) 71, 74

PAGE

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 33
United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199 (1968) 91
United States v. Fruehauf, 365 U.S. 146 (1961) 32
United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967) 64
United States v. Louisiana, 380 U.S. 145 (1965) 35
United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) 55
United States v. Mississippi, 380 U.S. 128 (1965) 35
United States v. Robel, 389 U.S. 258 (1967) 74
United States v. United States District Court, 444 F.2d 651 (6th Cir.), *cert. granted,* 39 U.S.L.W. 3556 (June 21, 1971) 74

Vietnam Veterans Against The War v. Nassau County Police Dep't, —— F. Supp. —— (E.D.N.Y. 1971) 37

Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944) 91
Watkins v. United States, 354 U.S. 178 (1957) 40, 41, 86
Watson v. City of Memphis, 373 U.S. 526 (1963) 38
Weiman v. Updegraff, 344 U.S. 183 (1952) 52
Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969) 65
Wolf v. Colorado, 338 U.S. 25 (1949) 61
Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2nd Cir. 1967) 40, 80, 88
Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961) 75

Yaffe v. Powers, 40 L.W. 2494 (1st Cir. Jan. 26, 1972) *rev'g* 71-514-J (D. Mass. June 13, 1971) 36
York v. Story, 324 F.2d 450 (6th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964) 62

PAGE

Younger v. Harris, 401 U.S. 37 (1971) 39
Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952) 27

Zwickler v. Koota, 389 U.S. 241 (1967) 22, 40, 50, 82

Constitutional Provisions:

United States Constitution

Article I, §8 71
Article III 1, 21
Article IV, §4 72
First Amendment ..... *passim*
Fourth Amendment 3, 30, 36, 64, 66
Fifth Amendment 3, 64
Ninth Amendment 3

Rules:

Federal Rules of Civil Procedure

Rule 8(a)(2) 9
Rule 12(b)(6) 8, 9
Rule 15(d) 19

Statutes:

10 U.S.C. §331 68
10 U.S.C. §332 68
10 U.S.C. §333 ..... 68, 70
10 U.S.C. §334 68
18 U.S.C. §592 75
18 U.S.C. §593 75

PAGE

18 U.S.C. §1384 75
18 U.S.C. §1385 75
28 U.S.C. §1331 62

Other Authorities:

13 A.L.R.3d 1025 63
14 A.L.R.2d 750 63

Askin, *Loyalty Oaths in Retrospect: Freedom and Reality,* 1968 Wisc. L. Rev. 465 51
Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication,* 22 Stan. L. Rev. 196 (1970) 86

Barron & Holtzoff, 1A *Federal Practice and Procedure* §356 (1960) 9
Beaney, *The Right to Privacy and American Law,* 31 Law and Contemporary Problems 253 (1966) 61

Comment, *Constitutional Law—Maintenance and Dissemination of Records of Arrest Versus The Right to Privacy,* 17 Wayne St. L. Rev. 995 (1971) 65
Comment, *The First Amendment Overbreadth Doctrine,* 84 Harv. L. Rev. 844 (1970) 85

Davis, *The Liberalized Law of Standing,* 37 U. Chi. L. Rev. 450 (1970) 80

Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, at 22-23 (proceedings of May 25, 1971) .. 69

PAGE

Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92nd Cong. 1st Sess., February 23-25 and March 2-4, 9-11, 15 and 17, 1971 ..... 15, 16, 17, 18, 19, 20, 55, 68, 71, 73, 90

Jaffe, Judicial Control of Administrative Actions (1965), p. 336 39

Jahoda and Cook, *Security Measures and Freedom of Thought,* 61 Yale L.J. 296 (1952) 59

Madison, 1 Annals of Congress 439 27

May, *Constitutional History of England;* 275 (1813) 29

Miller, *The Assault on Privacy* (1971, University of Michigan Press) 28, 61

New York Times, November 5, 1971, p. 22 31

Note, *The Chilling Effect in Constitutional Law,* 69 Colum. L. Rev. 808 (1969) 41, 54

Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct,* 78 Yale L.J. 143 (1968) 37

Note, *Police Undercover Agents: New Threat to First Amendment Freedoms,* 37 Geo. Wash. L. Rev. 634 (1969) 61

Orwell, *1984,* The New American Library, Signet (pocketbook edition) 7 28

Remarks of Representative Ellis, 7 Cong. Rec. 3850 (1878) 75

PAGE

Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181 (1962) 74

Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's, Part II—Balancing the Conflicting Demands of Privacy, Disclosure and Surveillance*, 66 Colum. L. Rev. 1205 (1966) 61

Wright & Miller, *Federal Practice and Procedure*, §1356 (1969) 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

Question Presented

Whether the Court of Appeals was correct in holding that respondents' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity is an unconstitutional burden on plaintiffs' exercise of their First Amendment rights—was justiciable under Article III.

Statement of the Case

The only issue before this Court is whether the complaint states a justiciable claim entitling plaintiffs[1] to a hearing. Because much of the government's Statement of the Case is based upon representations and documents which are not properly part of the record, and because the government ignores many of the material allegations made by plaintiffs, we set out in some detail the allegations of the complaint and the facts which underlie them.

On February 17, 1970, plaintiffs initiated this action on behalf of themselves and others similarly situated challenging the investigation of civilians engaged in lawful political activity by the United States Army (App. 1, 5-12). Plaintiffs complained that their constitutionally protected activities were being investigated "by military intelligence agents, . . . by anonymous informants, and through the use of photographic and electronic equipment" (App. 9), and that the information collected by the Army through such investigation was being "regularly, widely, and indiscriminately circulated . . . to numerous federal and state agencies" (App. 9, 11), published in a "Blacklist" (App. 9), and stored "in a computerized data bank" (App. 9) and "non-computerized records" (App. 10).

The complaint further alleged that the Army's domestic intelligence operations in the civilian community are unauthorized and overbroad, curtail political expression and debate among civilians, inhibit persons from associating with plaintiffs and thereby injure them and others similarly

[1] Respondents are referred to as plaintiffs throughout this brief.

situated by depriving them of their First Amendment rights of free speech and association and their right peaceably to assemble and to petition the government for redress of grievances (App. 11). Plaintiffs also alleged that the Army's surveillance activities abridge their right of privacy guaranteed by the Fourth, Fifth and Ninth Amendments to the Constitution (App. 8-11).

1. Proceedings in the courts below.

Having filed their complaint on February 17, 1970, plaintiffs filed a motion for a temporary restraining order and preliminary injunction on March 12, 1970, which would require the Army to cease investigating them and to deliver to the court *in camera* all blacklists, publications, records, reports, photographs, recordings, data computer tapes and cards, and other materials maintained by the Army, describing and interpreting their lawful political activities. The motion for a temporary restraining order was denied on March 13. On April 22, plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction. The court, however, denied their request to proceed with witnesses and documentary evidence (App. 123), denied their motion for a preliminary injunction, and granted the government's motion to dismiss the complaint for failure to state a claim upon which relief could be granted (App. 126, 128). Defendants never filed an answer.

Plaintiffs appealed the dismissal, and on April 27, 1971, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey in which he was joined fully by Judge Tamm and in part by Judge MacKinnon, reversed

the decision of the District Court on the grounds that the complaint sufficiently stated a cause of action and the controversy between the parties was justiciable (App. 129-48). In remanding the case for full evidentiary proceedings on the motion for a preliminary injunction, the Court of Appeals instructed the District Court to determine (1) the nature and extent of the Army domestic intelligence system, the methods of gathering information, its content and substance, the methods of retention and distribution, and the recipients of the information; (2) what part of the Army domestic intelligence system is unrelated to or not reasonably related to the performance of the Army's statutory and constitutional mission; (3) whether the existence of any overbroad aspects of the intelligence gathering system has or might have an inhibiting effect on the plaintiffs and others similarly situated; and (4) what relief is called for in accordance with the evidence (App. 147-48).

2. Plaintiffs' unchallenged allegations which must be broadly construed and accepted as true in face of the government's motion to dismiss.

A. *Allegations about the plaintiffs and the Army's investigation of their political activities.*

The plaintiffs are four individuals and nine unincorporated associations engaged in lawful political activity, including but not limited to union organizing, public speaking, peaceful assembly, petitioning the government, newspaper editorializing, and educating the public about political issues (App. 6-7). They include government

employees,[2] attorneys,[3] clergymen,[4] pacifists and pacifist organizations,[5] veterans of the armed forces,[6] and groups opposed to American involvement in the war in Southeast Asia[7] (App. (6-7). Members of the plaintiff associations also include current and prospective government employees, students, professionals, and others whose status, employment and livelihood are threatened by the Army's maintenance of files and dossiers on their political activities and associations (App. 10). All of the named plaintiffs have been subjects of political surveillance, and all are believed to be subjects of reports, files, or dossiers maintained by the Army (App. 9).

Exhibit A to the complaint is a document entitled, "USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12," containing "items of intelligence interest for the period 0600 hrs., Monday, 11 March 68 to 0600 hrs., Monday 18 March 68" (App. 14). This document is a report on the constitutionally protected political activities of plaintiffs and others similarly situated and, upon information and belief, is representative of similar reports

---

[2] The American Federation of State, County & Municipal Employees.

[3] Conrad Lynn and Benjamin N. Wyatt, Jr.

[4] Rev. Albert B. Cleage, Jr. and Clergy and Laymen Concerned about the War in Vietnam.

[5] War Resisters League; Arlo Tatum, the Executive Secretary of the Central Committee for Conscientious Objectors; and Women's Strike for Peace.

[6] Veterans for Peace in Vietnam.

[7] The Vietnam Moratorium Committee; the Vietnam Week Committee of the University of Pennsylvania; the Vietnam Education Group; and Chicago Area Women for Peace.

prepared weekly by military intelligence units. Such reports were widely and indiscriminately distributed to civilian and military officials within the Department of Defense, to civilian officials in federal, state and local governments, and to each military intelligence unit and troop command in the Continental United States as well as Army headquarters in Europe, Alaska, Hawaii and Panama,[8] and were stored in one or more data banks in the Department of the Army (App. 9, 26-27). Typical of the reports concerning the plaintiffs' activities are the following:

> FRIDAY, 15 MARCH 1968:
> PHILADELPHIA, PA.: A. *THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE* SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. *CONRAD LYNN*, AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEET-

[8] Exhibit A is expressly directed to: "CG FIRST ARMY (THRU 109TH MI GP); CG, THIRD ARMY (THRU 111TH MI GP); CG FOURTH ARMY (THRU 112TH MI GP); CG, FIFTH ARMY (THRU 113TH MI GP); CG, SIXTH ARMY (THRU 115TH MI GP); CG, XVIII ABN CORPS; CG, III CORPS (THRU DCSI FOURTH ARMY); CG, MDW (THRU 116TH MI GP); CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY); CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY); CG, 82D ABN DIV (THRU XVIII ABN CORPS); CG, 5TH INF DIV (THRU DCSI FIFTH ARMY); CG, USARHAW (THRU 710TH MI DET); CG, FT DEVENS (THRU 108TH MI CP); CO, 902D MI GP (THRU 116TH MI GP); CO 108TH MI GP; CO, 109TH MI GP; CO, 111TH MI GP; CO, 112TH MI CP; CO, 113TH MI GP; CO, 115TH MI GP; CO, 116TH MI GP; CO, 710 MI DET; DIRECTOR ANMCC (PASS TO DIA ELEMENT); USAINTC LNO, PENTAGON." Eleven other recipients are indicated by code (App. 13-14).

ING. FOLLOWING THE QUESTION AND ANSWER PERIOD ROBERT EDENBAUM OF THE *CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS* STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.

B. *REV. ALBERT CLEAGE, JR.* THE FOUNDER OF THE BLACK CHRISTIAN NATIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS (App. 17).[9]

B. *Allegations of injury to the plaintiffs.*

Paragraph 15 of the complaint alleges that "[t]he purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and others similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment by *invading their privacy, damaging their*

[9] The peaceful political activities of members of the plaintiffs' class are also reported in the Weekly Intelligence Summary, *e.g.*:

WEDNESDAY, 13 MARCH 1968

BROOKLYN, N.Y.: ABOUT 35 PERSONS PARTICIPATED IN A DEMONSTRATION AT THE MAIN GATE OF FORT HAMILTON TO PROTEST THE SCHEDULED INDUCTION OF PETER BEHR. MANY OF THE PROTESTORS DISTRIBUTED LEAFLETS AND FLOWERS TO PERSONS ENTERING THE FORT. THE DEMONSTRATION LASTED APPROXIMATELY ONE AND ONE HALF HOURS AND ENDED WITHOUT INCIDENT (App. 15).

reputations, adversely affecting their employment and their opportunities for employment, and in other ways" (App. 10). (emphasis added). The specific deterrent induced by the Army's surveillance activities is the plaintiffs' "fear [that] they will be made *subjects of reports* in the Army's intelligence network, that *permanent reports of their activities will be maintained* in the Army's data bank, that *their 'profiles' will appear in the so-called 'Blacklist'* and that all of this information will be *released to numerous federal and state agencies* upon request" (App. 11) (emphasis added).

The government's Statement of the Case ignores these allegations of injury, and attempts through the introduction of highly questionable allegations of fact which have not been subjected to cross-examination in court, to convey the impression that Army surveillance is justified.[10] But in appellate review of a successful motion to dismiss, the plaintiffs' allegations of injury must be broadly con-

[10] Rule 12(b)(6) of the Federal Rules of Civil Procedure states, in part: "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." However, having clearly stated that it was treating the government's motion as one made pursuant to Rule 12(b)(6) (App. 128), the District Court was bound to exclude matters outside the pleadings in determining the sufficiency of the complaint. Wright & Miller, *Federal Practice and Procedure*, § 1356 (1969). To do otherwise would have required the court to give plaintiffs ". . . reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b)(6). Having failed, therefore, to give plaintiffs such opportunity to be heard, having excluded their witnesses, and having characterized the government's motion as one brought pursuant to Rule 12(b)(6), the District Court could not have admitted the government's affidavits in considering the motion to dismiss. It should be noted that the government filed four affidavits on April 20, 1970, only two days prior to the District Court hearing. Those affidavits are frequently cited in the government's brief.

strued and taken as true[11] unless they are stated as conclusions of law or are inconsistent or unwarranted deductions of fact.

Specific constitutional injuries to the plaintiffs are legion on the face of the pleadings. Adverse effect on the government employment of members of the plaintiff American Federation of State, County and Municipal Employees stems from their inclusion in Army files and dossiers on civilians "who might be involved in civil disturbance situations"—files which are disseminated by the Army to federal and state agencies (App. 11, 26, 54). Damage to the

---

[11] In reviewing the sufficiency of a complaint on a motion to dismiss, this Court has consistently held that "the material allegations of the complaint are taken as admitted." *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969). See also, *California Motor Transport* v. *Trucking Unlimited*, 40 U.S.L.W. 4153, 4155 (January 13, 1972); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951).

Since Rule 8(a)(2) of the Federal Rules of Civil Procedure only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," the courts have generally looked with disfavor on Rule 12(b)(6) motions. This is especially true when a "unique" legal theory is propounded (App. 139). See *Shull* v. *Pilot Life Ins. Co.*, 313 F.2d 445, 447 (5th Cir. 1963). In assessing the sufficiency of a complaint, this Court has consistently adhered to the rule enunciated in *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957):

> "In appraising the sufficiency of a complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Therefore, recognizing " . . . that the Federal Rules of Civil Procedure, do not require a claimant to set out in detail the facts upon which he bases his claim," *Conley* v. *Gibson*, *supra*, at 47, the test is whether the material allegations of the complaint, liberally construed, with all ambiguities resolved in favor of the plaintiff, are sufficient to support a claim upon which relief can be granted. See Wright & Miller, *supra*, § 1357, fns. 75-77; Barron & Holtzoff, 1A *Federal Practice and Procedure* § 356, fn. 93 (1960).

plaintiffs' reputations is illustrated in the case of Conrad Lynn, a New York attorney experienced in litigation under the Military and Selective Service Act, who is characterized in an Army intelligence file as "an author of draft evasion literature" (App. 17). A similar characterization is made in an Army file with regard to a member of the Central Committee for Conscientious Objectors (App. 17). The characterization of persons, including plaintiffs and members of their class, whose names appear on an Army "identification list" of civilians (App. 9-11, 25, 27), as individuals "who might be involved in civil disturbance situations" (App. 54) constitutes an immediate threat to their employment and damage to their reputations within the precise terms of the complaint (App. 10). Finally, the injuries and threatened injuries to the privacy, employment and reputations of the plaintiffs are visited upon them solely because they have exercised their First Amendment rights, and they are thus deterred from further vigorous exercise of those rights (App. 10-11), in addition to being deprived of their freedom of association with those citizens who are deterred from "free and open discussion of issues of public importance" (App. 11) for fear of becoming a target of defendants' surveillance network (App. 10-11).

C. *Allegations about the scope of the Army's domestic intelligence system.*

Plaintiffs allege and the government does not deny that the Army has stationed intelligence agents in more than three hundred domestic intelligence units throughout the United States (App. 23, 52); that these agents have intruded themselves into civilian politics by monitoring, re-

porting and interpreting the political and often private activities and associations of civilians (App. 8-10, 23-27); that the Army Intelligence Command maintains an undetermined number of computerized and non-computerized data banks on political protests occurring any place in the United States (App. 9-10, 23); that the information on civilian political protests collected by the Army Intelligence Command has been widely and indiscriminately disseminated to military and civilian agencies of government (App. 9, 27); that the Army Intelligence Command has compiled an identification Blacklist including photographs of civilians "who might cause trouble for the Army" (App. 9, 25); and that Army intelligence agents have infiltrated civilian political organizations[12] and used improper methods to acquire confidential information about private persons[13] (App. 9, 23-24).

---

[12] Although the plaintiffs were denied an evidentiary hearing in the District Court, they were prepared to introduce evidence, through the testimony of witnesses who were in the courtroom that Army intelligence agents had infiltrated private social, political and religious groups exercising their freedom of association and their right of privacy. Plaintiffs' counsel made an offer of proof that one such witness, Oliver Allen Peirce, who had served in the Fifth Division, Military Intelligence Detachment at Fort Carson, Colorado, from May 1, 1969 to December 19, 1969, would testify "that he was instructed to infiltrate a group known as the Young Adults Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization in the Colorado Springs area; [and] that he was instructed to become a member of this group and to make regular reports on what was going on . . ." (Transcript of Proceedings in the District Court, April 22, 1970, at pp. 29-30).

[13] It is alleged in Appendix B to the complaint, for example, that agents of the 108th Military Intelligence Group in New York City have acquired confidential academic records of students at Columbia University without the knowledge or consent of the students or the University (App. 23-24).

During the two months between the filing of the complaint on February 17, 1970 and oral argument on plaintiffs' motion for a preliminary injunction and on the government's motion to dismiss on April 22, 1970, additional aspects of the Army's surveillance system were revealed through statements made by Army spokesmen under pressure of Congressional inquiry, this lawsuit, and adverse publicity. In letters dated February 25 and 26, 1970 and addressed to plaintiffs' counsel and more than thirty members of Congress (App. 51-55), Robert E. Jordan III, then Army General Counsel, acknowledged that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission requirements" (App. 54). Mr. Jordan admitted that the Army Intelligence Command maintained a computerized data bank at Fort Holabird, Maryland concerning civilian political activity throughout the nation (App. 52, 55), and distributed an "identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations" (App. 54).[14]

---

[14] Although Mr. Jordan asserted that the Fort Holabird computerized data bank would be "discontinued," he made no reference to duplicate and additional information located at other Army record centers (App. 51-55). He also stated that "[n]o computer data bank of civil disturbance information is being maintained" (App. 55), which the plaintiffs contend was inaccurate. Because of the vagueness of Mr. Jordan's letter, Senator Sam J. Ervin, Chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, wrote to the the Secretary of the Army on February 27, 1970 to request further information about the scope of the Army's domestic surveillance system (App. 61-62). Senators Abraham Ribicoff and William Fulbright and Congressman Cornelius Gallagher similarly pressed the Secretary for information (App. 63-65, 74-75).

To answer mounting Congressional criticism, Under Secretary of the Army Thaddeus Beal wrote to Congressman Gallagher and Senator Ervin on March 20, 1970 (App. 76-86). He disclosed the existence of a second "identification list . . . on individuals and organizations" prepared by the Counterintelligence Analysis Division (App. 81). Mr. Beal also acknowledged the maintenance by the Army of microfilm data banks on civilian political activity, and stated that such data banks would continue to be compiled and maintained (App. 81). Apart from these admissions, however, the Under Secretary denied the existence of any other intelligence files. Eight days earlier, however, in their motion papers for a temporary restraining order and preliminary injunction, plaintiffs had specifically charged that the defendants were concealing the existence of:

(1) a second computerized national domestic intelligence data bank, much larger than the one at Fort Holabird, maintained by the Continental Army Command at Fort Monroe, Virginia (App. 48);

(2) regional intelligence data banks including files and documents on political activities of individual citizens and organizations maintained by the First, Third, Fourth, Fifth, and Sixth Armies, and the Military District of Washington, D.C.; and by the 108th, 109th, 111th, 112th, 113th, 115th, 116th, and 902nd Military Intelligence Groups, and the 710th Military Intelligence Detachment, at Fort Devens, Massachusetts; Fort Meade, Maryland; Fort MacPherson, Georgia; Fort Sam Houston, Texas; Fort Sheridan, Illinois; San Francisco, California; and Honolulu, Hawaii, respectively (App. 48);

(3) cards and documents stored at the Headquarters of the Army Intelligence Command from which the Fort Hola-

bird domestic intelligence data bank was organized and made operable (App. 48);

(4) a second blacklist, larger than the first, known as the "Compendium" and published by the Counterintelligence Analysis Division of the Army in two volumes entitled, *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest,* describing politically active individuals and organizations unassociated with the armed forces or with civil disturbances, but believed by the Army to be sources of "dissidence" (App. 48).

3. Events subsequent to the proceedings in the District Court of which the Court should take notice for the sole purpose of determining the justiciability of plaintiffs' claims.

The government's brief discusses events subsequent to the filing of this lawsuit and facts outside the scope of the proceedings in the District Court for the purpose of bolstering that court's decision. Thus, it claims that the Army's investigative activities have been discontinued and that the files and dossiers resulting therefrom have been destroyed (Gov't. Brief, pp. 9-11, 34). It also argues that the allegations of injury to the plaintiffs are unsubstantiated by facts in the record (*Id.,* p. 20). Whether these contentions spring from the government's desire to broaden the issues before this Court or its unwillingness to have the Court test the sufficiency of the pleadings on their face, the plaintiffs are entitled to present a rebuttal. In doing so they request the Court to take notice of two events subsequent to the District Court proceedings in order to complete the record in this case: (1) the transcript of a hearing on a motion for a preliminary injunction made by mem-

bers of the plaintiffs' class in a case involving the same subject matter as the case at bar, *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal argued *sub nom. ACLU* v. *Laird,* 71-1159 (7th Cir. 1972), and (2) Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess., February 23-25 and March 2-4, 9-11, 15, and 17, 1971 [hereinafter "the Ervin Hearings."][15]

A. *The partial reforms cited by the government do not prove that the Army's investigation of civilian politics has been discontinued and that the files and dossiers resulting therefrom have been destroyed.*

The government's Statement of the Case attempts to convey the impression that the controversy before the Court is moot.[16] Under these circumstances the plaintiffs are entitled to go outside the record to demonstrate that the case is not moot.[17]

---

[15] Even for the purpose of deciding issues on the merits, this Court has taken notice of legislative committee reports, *Carolene Products Co.* v. *United States,* 323 U.S. 18, 28 (1944); cf. *Elliott* v. *Home Loan Bank Board,* 233 F. Supp. 578 (N.D. Cal.) rev'd on other gds., 386 F.2d 42 (9th Cir. 1964), cert. denied 390 U.S. 1011 (1965), and may of course take notice of the record in other proceedings within the federal judicial system, *Brown* v. *Board of Education,* 347 U.S. 483 (1954); see also *Paul* v. *Dade County,* 419 F.2d 10 (5th Cir. 1969), *cert. denied,* 397 U.S. 1065 (1970).

[16] The government having injected the issue of mootness into this case, the plaintiffs would be entitled on remand to offer evidence addressed to that issue. The government, therefore, cannot be heard to object to any proof by the plaintiffs that the Army continues to compile and maintain files and dossiers on civilian political activity, Army regulations to the contrary notwithstanding. Cf. *SEC* v. *Rapp,* 304 F.2d 786 (2d Cir. 1962); *Kirk* v. *United States,* 232 F.2d 763 (9th Cir. 1956).

[17] *See* discussion of mootness at pp. 88-91, *infra.*

The vagueness of the Army directives initiating domestic surveillance, and the equivocal directives purporting to reduce it are exhaustively documented in the Ervin Hearings.[18] Contrary to the assertion by the government that Army surveillance focused on "selected public gatherings . . . that were thought to have a potential for civil disorder" (Gov't. Brief, p. 5), surveillance was neither selective, nor restricted to public gatherings, nor limited to even the broadest definition of potential civil disorders.[19] The directives setting up the Army surveillance program were extremely broad, unlike the narrower "family of contingency plans" referred to by the government in its brief (*Id.*), which related only to the logistics of troop movements.[20]

---

[18] *See* Ervin Hearings, Part I, pp. 160, 175, 246-47, 258-59, 280-81, 297, 315, 323, 327, 330, 385, 418, 430; Transcript of Proceedings in the District Court, *ACLU* v. *Westmoreland, supra* [hereinafter "*Westmoreland* Transcript"], p. 629. See also the following colloquy, at p. 418, between Senator Ervin and Secretary Froehlke concerning the latter's prepared statement about the scope of Army surveillance:

> Senator ERVIN: This statement states in effect that it was a very unfortunate thing that many of the things which the military did were not spelled out in any kind of written guideline, and many of them were the result of oral orders and many of them were the result of conversations between the military and civilian law enforcement officers. Is that a fair statement?
>
> Mr. FROEHLKE: That is a fair statement.

[19] Ervin Hearings, Part I, pp. 111-12, 176, 247, 263, 265, 267, 299, 317-18, 337, 376; *Westmoreland* Transcript, pp. 249, 257, 619, 758-59, 818, 847-48.

[20] Ervin Hearings, Part I, pp. 111-12, 261, 280-81, 297, 299, 421, 872; *Westmoreland* Transcript, pp. 201-03, 260, 330, 345, 374, 1066. Secretary Froehlke testified, at p. 421 of the Ervin Hearings, that ". . . both the collection plans of February 1, and May 2, [1968] could be interpreted in such a way that would permit surveillance of almost anybody who is active in a community where there was a civil disturbance. Both plans were very broad." Indeed, as former

While the scope of the Army's investigation of civilians was never defined by civilian authorities prior to the initiation of this lawsuit,[21] subsequent attempts by the Army to destroy the fruits of its investigation have been substantially ineffective. The government maintains, for example, that "spot reports"—the raw data of surveillance—are "destroyed 60 days after publication" (*Id.*, p. 10; App. 80), but it does not disclose that the raw data is first transferred to "agent reports," "after-action reports," "biographic reports," and "summaries of investigations".[22] Furthermore, although the investigative data abstracted from spot reports was no longer computerized after February 1970, non-computerized domestic intelligence reports continue to be maintained by the Army.[23] Similarly, the government contends that the identification list[24] was destroyed in February 1970 (*Id.*, p. 10), but fails to explain that the "order . . . to return" (*Id.*) the 300 copies of the list outside the Army was inexplicably changed at the last minute to an order to destroy all copies, which the Hearings testimony shows has not been carried out.[25] Finally, the government

---

agent Joseph Levin, Jr. testified, the breadth of the collection plans resulted in even broader instructions to the agents in the field: "It is the nature of the Army system to expand on requirements as each directive travels down the chain of command. . . . [I]ntelligence requirements at field office level rarely bore any resemblance to the order issued from Fort Holabird or even Group Headquarters." *Id.*, p. 297.

[21] Ervin Hearings, Part I, pp. 115, 146, 151, 154, 156, 163, 202, 206-07, 210, 217-18, 322, 454, 462.

[22] *Id.*, pp. 177, 179, 180, 211, 234-35, 238, 264, 331, 390, 465.

[23] *Id.*, pp. 156, 159, 209-10.

[24] *Id.*, pp. 148, 166, 186, 191-92, 207-08, 211-13, 226-27, 249, 266-67, 269, 277, 455-56, 866; *Westmoreland* Transcript, pp. 455, 887-91, 1029.

[25] Ervin Hearings, Part I, pp. 216, 238, 249, 279-80, 394, 428.

points to a policy letter from the Adjutant General as evidence that domestic surveillance "was severely restricted in June 1970" (*Id.*, pp. 9, 45-52). Apart from this bald assertion, however, there is no basis for concluding that the letter eliminated the activities complained of in this lawsuit. Indeed, as Senator Ervin remarked in a letter to the Secretary of the Army, "the exceptions, qualifications and lack of criteria in your policy letter could lead the average citizen . . . to wonder just how much of a change it represents in government policy." [26]

Other errors and omissions in the government's Statement of the Case cast further doubt on its claim that Army surveillance has ceased. The assertion, for example, that "surveillance activity decreased" after the "Spring and Summer of 1968" (*Id.*, p. 9) flies in the face of the most comprehensive of all Army Collection Plans authorizing political surveillance, which was issued in May of 1969.[27]

---

[26] Ervin Hearings, Part II, p. 1102. See also *Id.*, Part I, pp. 102, 214-15, 222, 281, 435; *Westmoreland* Transcript, pp. 536, 540, 912.

[27] Ervin Hearings, Part II, pp. 1731-37. The Plan includes, inter alia, the names and identification numbers of the following organizations to be monitored:

American Friends Service Committee (AFSC)	ZB 00 02 00
Americans for Democratic Action (ADA)	ZA 00 17 81
Committee for Non-Violent Action (CNVA)	ZB 00 87 79
Congress of Racial Equality (CORE)	ZB 00 14 77
Clergy and Laymen Concerned About Vietnam (CLCAV)	ZB 50 05 27
Fifth Avenue Vietnam Peace Committee (FAVPC)	ZB 02 12 68
Institute for the Study of Non-Violence (ISNV)	ZB 50 03 86
Interfaith Peace Mission (IPM)	ZB 50 10 64
National Association for the Advancement of Colored People (NAACP)	ZA 00 04 02
National Committee for a Sane Nuclear Policy (SANE)	ZA 00 90 26

(*footnote continued on following page*)

By the same token, the government's claim that political intelligence data and the special identification lists "were kept apart" from the Army's investigative files of "personnel, civilian employees and contractors' employees" (*Id.*, p. 8), cannot withstand evidence that the fruits of Army surveillance can now be found in the investigative files of a host of military and civilian agencies.[28]

B. *Plaintiffs have a right to file supplemental pleadings to substantiate their allegations of injury with facts unknown at the time the complaint was filed.*

Although their allegations of injury are more than sufficient to state a cause of action, plaintiffs would be entitled on remand to file supplemental pleadings to bring their complaint up to date.[29] There are at least five categories of

---

Southern Christian Leadership Conference (SCLC)	ZB 00 87 94
Student Non-Violent Coordinating Committee (SNCC)	ZB 01 13 29
Veterans and Reservists to End the War in Vietnam (VREWV)	ZA 02 17 70
Veterans for Peace in Vietnam (VPV)	ZB 02 18 03
Women Strike for Peace (WSP)	ZB 01 36 95

[28] This is understandable in light of testimony in the Ervin Hearings that political intelligence data collected as "civil disturbance information" have been filed in security clearance dossiers. Ervin Hearings, Pt. I, p. 230. See also, *Id.*, pp. 151, 156, 160, 212, 216, 223, 225, 234, 259, 275, 323, 428, 428, 465; *Westmoreland* Transcript, pp. 849-50.

[29] An appellate court may, on proper showing, remand a case expressly for the purpose of permitting a party to file supplemental pleadings under Rule 15(d) of the Federal Rules of Civil Procedure, "setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented." See, e.g., *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966); *Southern Pacific Railroad* v. *Conway*, 115 F.2d 746 (9th Cir. 1940).

allegations pertaining to their injury which the plaintiffs can now substantiate in even greater detail with witnesses who testified at the Ervin Hearings and at the evidentiary hearing in *ACLU* v. *Westmoreland*. First, the plaintiffs can prove the Army has conducted surveillance of wholly private activity;[30] second, that the Army's files and dossiers on civilians have been misused and indiscriminately disseminated;[31] third, that their employment or prospective employment within or without the government is jeopardized by such misuse and indiscriminate dissemination of files and dossiers on civilian political activity;[32] fourth, that their reputations have been damaged and defamed by the Army's investigative activities;[33] and finally, that as a result of the Army's investigation of civilian politics, members of the plaintiff organizations have been deterred from continuing their membership and prospective members have been dissuaded from joining.[34]

---

[30] Ervin Hearings, Part I, pp. 171, 185, 198, 200-01, 204, 213, 217, 223, 234, 255, 285-86, 290-91, 294-95, 300, 306, 308-09, 387, 445; *Westmoreland* Transcript, pp. 178-79, 205-06, 216-18, 244, 269, 299-300, 311, 359, 373, 515, 560.

[31] Ervin Hearings, Part I, pp. 151, 153-55, 162, 166, 187, 191-92, 195, 211, 224, 234, 266, 270, 319-20, 460, 465; *Westmoreland* Transcript, pp. 103, 156, 179, 214-16, 653, 708, 759, 1016, 1069.

[32] Ervin Hearings, pp. 183, 231.

[33] *Id.*, pp. 131, 141, 183, 232, 266, 342; *Westmoreland* Transcript, pp. 64, 486-87, 498-99.

[34] *See, e.g.*, Ervin Hearings, Part I, p. 231; *Westmoreland* Transcript, pp. 41, 492, 499.

Summary of Argument

The issues presented by the government are illusory. In the court below the government argued that plaintiffs' claims were not justiciable in the sense that justiciability requires a judicially identifiable right and breach of duty, and a remedy within the power of the court. That argument has been abandoned here. The government now shifts its ground to focus on a different aspect of the justiciability doctrine, arguing that plaintiffs' claims are unripe because they lack sufficient focus and concreteness to be presented in an adversary context. Plaintiffs demonstrate that this position is no sounder than the government's earlier one.

I.

Justiciability

The plaintiffs are being spied upon and monitored by the Army and they challenge the Army's right to treat them in that way. So viewed, it is hard to understand how the government can deny that this case is presented in a context "that imparts the necessary concrete adverseness" consistent with the limitations of Article III. *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). Nothing more is needed or foreseeable which would make this case more ripe for adjudication.

The government relies on the dictum of *Flast, supra,* forbidding adjudication of "generalized grievances" about the conduct of government, 392 U.S. at 106; but *Flast* itself was much nearer to being a generalized grievance against government than the instant case. There the plain-

tiffs were challenging a nationwide governmental program which affected them equally with all other citizens. Here, plaintiffs are part of the comparatively narrow group upon which the Army's surveillance system focuses. See also *Baker* v. *Carr*, 369 U.S. 186 (1962), *Evers* v. *Dwyer*, 358 U.S. 202 (1958), cases closer to being "generalized grievances" against government than the instant one.

Furthermore, in numerous cases over the past decade, this Court has emphasized that normal barriers to justiciability must be lowered where government action results in a present inhibition on the exercise of First Amendment rights. *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).

Indeed, in none of the many cases challenging governmental surveillance of political activists now being litigated around the country has any court save the District Court below doubted the justiciability of the question, although on the merits courts have arrived at a variety of conclusions. See, e.g., *Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678 (1970), remanding a suit against the New Jersey State Police for an evidentiary hearing. In fact, while the government challenges the justiciability of this attack on the Army's domestic intelligence program, it is also litigating the merits of a challenge to the same program, which arose in the Northern District of Illinois. *ACLU* v. *Westmoreland*, 70 Civ. 3191 (N.D. Ill., 1970), *appeal argued sub nom. ACLU* v. *Laird*, 71-1159 (7th Cir., 1972).

If the government is arguing that plaintiffs' claims of abridgment of First Amendment rights cannot be substan-

tiated, their arguments are premature. It would be improper at this point in the proceedings for this Court to hold that the Army's surveillance program has not deterred the exercise of First Amendment rights. Plaintiffs are at least entitled to an evidentiary hearing on this question.

Furthermore, in many cases over the past decade, this Court has taken notice, without demanding specific proof, of the chilling effect on First Amendment rights caused by governmental programs which reach overbroadly into areas of protected speech and association. Moreover, the validity of the Court's assumptions in those cases is documented in the professional literature of the social sciences. See *Keyishian* v. *Board of Regents*, 385 U.S. 589, 607 (1967).

It is plaintiffs' position, therefore, that if they can prove their allegations about the Army's behavior, a court may in fact assume a chilling effect; but in the alternative, plaintiffs must be afforded the opportunity to offer evidence of that chill. In either event, this case would have to be remanded for a full evidentiary hearing.

Separate and apart from the injury to First Amendment rights involved in this case, courts have traditionally recognized as justiciable complaints about invasions of privacy such as plaintiffs describe. Every individual has a right to be free from needless invasions of his privacy and the plaintiffs' allegation that the Army has invaded their private lives (App. 10) is alone sufficient to invoke their right to judicial protection.

The justiciability of plaintiffs' claims is enhanced by the fact that the Army's surveillance program constitutes

an unauthorized military incursion into civilian affairs. Cognizant of the complaint in the Declaration of Independence that the King had "effected to render the military independent and superior to the civil power," our courts have always been alert to invoke their equitable powers where the Army has acted beyond its constitutional and statutory mission and intruded into civilian affairs.

II.

Standing

The government argues that even if the claims asserted are justiciable, these plaintiffs lack standing to raise them because they are not the persons who are "chilled and cowed" by the Army's surveillance program. Plaintiffs have made no such concession. An isolated statement taken out of context from counsel's oral argument in the Court of Appeals while discussing a different issue, does not constitute part of the evidence in this case. Plaintiffs do concede only that they are not so chilled and cowed that they are afraid to come into court to protect their First Amendment rights. What is uncontested at this time and must be accepted as true for these proceedings is that plaintiffs are deterred in the full and vigorous exercise of their rights.

Furthermore, this Court has fashioned "an exception to the usual rules governing standing" in cases involving First Amendment freedoms, *Dombrowski* v. *Pfister*, 380 U.S. at 486, recognizing, as has the Supreme Court of New Jersey, that ". . . . there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters." *Anderson* v. *Sills*, 56 N.J. at 221.

Plaintiff individuals and organizations clearly have standing to complain about the harm done to their own First Amendment rights when others less bold than they are deterred from associating with and assisting plaintiffs in their political activities. For those plaintiffs involved in anti-war activities, for example, any diminution of anti-war activism, as a result of Army surveillance, undermines their First Amendment right to persuade their fellow citizens to their point of view.

It is, therefore, the height of sophistry to suggest as the government does, that "millions of Americans" can be deterred from the political activities in which plaintiffs are engaged but that unless plaintiffs are themselves deterred their First Amendment rights are unimpaired. The First Amendment promises more than the right to be a lone voice in the wilderness. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250-51 (1957). Additionally, plaintiff organizations have standing to represent the rights of their members. *NAACP* v. *Alabama,* 357 U.S. 449 (1958).

With that in mind, plaintiffs clearly meet the test for standing set down by the Court in *Association of Data Processing Service Organization, Inc.* v. *Camp,* 397 U.S. 150, 152-53 (1970), in that they have (1) alleged "injury in fact, economic or otherwise", and (2) can show that the interests they seek to enforce are "within the zone of interests to be protected . . . by the . . . constitutional guarantee in question." There can be no doubt that the interests plaintiffs seek to protect in this case are within the First Amendment zone, or, as the issue was defined in *Flast* v. *Cohen,* 392 U.S. at 102, that there is a "logical nexus" between plaintiffs' status as active political dis-

senters and the First Amendment claims they seek to adjudicate.

Even apart from the First Amendment questions presented by this case, plaintiffs have standing to adjudicate the invasion of their privacy caused when military agents monitor their activities and keep dossiers on their private and public lives.

For all of the above reasons, Judge Wilkey was correct when he wrote for the court below that plaintiffs "have standing to seek redress in court and will provide the necessary adversary interest that is required by the standing doctrine . . ." (App. 140 n. 17).

ARGUMENT

Introduction

Stripped of technicalities, the question before the Court is whether the Army may abridge First Amendment rights by an unconstitutional program in excess of its statutory authority while remaining immune from judicial review. The answer to that question must be "No"; otherwise, as this Court noted more than a hundred years ago in a similar context, "republican government is a failure, and there is an end of liberty regulated by law," for "civil liberty and this kind of martial law cannot endure together. . . ." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 124-125 (1866). Fortunately, republican government and civil liberty continue to exist in this country, thanks in large part to decisions of this Court in cases such as *Milligan*.

This Court has always subscribed to the doctrine that "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). This is, as Chief Justice John Marshall said, "the very essence of judicial duty." *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803). The fact that the constitutional denial is caused by the action of some other branch of the federal government has not deflected the Court from the exercise of that sworn duty, even in the most difficult and awkward circumstances. See *Marbury* v. *Madison, supra; Youngstown Sheet and Tube* v. *Sawyer*, 343 U.S. 579 (1952); *Powell* v. *McCormack*, 395 U.S. 486 (1969). In this way the Court has remained true to the advice of James Madison to stand as an "impenetrable bulwark against every assumption of power which threatens our liberties." James Madison, 1 Annals of Congress 439. *New York Times* v. *United States*, 403 U.S. 713, 714 (Black, J., concurring).

Thus it is not surprising that the government attempts to conceal the real issue in this case behind a barrage of technicality. But it cannot hide the fact that, for purposes of this proceeding, it must concede both the illegality of the Army's conduct and the serious damage that conduct has done to rights of free speech and association. That is the meaning of the justiciability issue raised by the government—that the Army is immune from any judicial control of the lawless and injurious course of conduct challenged by plaintiffs.

Under the government's theory of justiciability, that course of conduct remains immune from judicial review unless and until some specific individual can prove not

only that he lost his freedom of speech as a result, but also that he lost a job or went to jail. This immunity presumably continues even until a time when:

> [Y]ou had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.[35]

The government would then still assert the issue was nonjusticiable.[36] Plaintiffs insist our jurisprudence is made of sterner stuff, and requires judicial intervention at the point at which First Amendment rights are first impaired.

It is not a novel theory to assert the inextricable link between the freedoms of speech and association protected by the First Amendment and the right to be free from military surveillance asserted by the plaintiffs. More than 150 years ago, a noted historian wrote:

> Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators —who shall say they are free? Nothing is more revolting to Englishmen than the espionage which forms

---

[35] Orwell, "1984," The New American Library, Signet (pocketbook) edition, 7. See also the warning of Prof. Arthur Miller in his recently published study, *The Assault on Privacy* (1971, University of Michigan Press):

> [T]here is certain to be a time in the very near future when the application of the technology to personal data will reach an acceleration point after which our capability of managing information flow will be seriously impaired (at 209).

[36] Compare footnote 17 in *Flast* v. *Cohen*, 392 U.S. 83, 98 (1968).

> the heart of the administrative system of continental despots. It haunts men like an evil genius, chills their friendships and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. [May, *Constitutional History of England*, 275 (1813).]

This Court has long adhered to the principle that the First Amendment's guarantee of "associational freedom . . . creates a preserve where the views of the individual are made inviolate." *Schneider* v. *Smith*, 390 U.S. 17, 25 (1968). It would surely be the "hallmark of a police state," *Shuttlesworth* v. *Birmingham*, 383 U.S. 87, 91 (1965), if the military were to win exemption from judicial control for the kind of domestic espionage program at issue here, and it would convert Mr. Justice Douglas' warning into a prophecy:

> The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone. If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people.

Osborn v. *United States*, 385 U.S. 323, 353-54 (1966) (dissenting opinion).[37]

The right to judicial review is in no way diluted because of the troubled times in which we live and the Army's claim of necessity to deal with civil disorders (Gov't. Brief, pp. 31-33). As Mr. Justice Stewart reminded us last term in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971), speaking of analogous Fourth Amendment rights:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. . . . If times have changed, reducing every-man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

It is against such a background that this Court has developed "sensitive tools," *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967), to guard against even the most "subtle governmental interference" with First Amendment rights. *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960).

Yet in the face of that proud history, the government now suggests that this Court shut its eyes to the assault on free speech and association committed by the Army's domestic surveillance program. It would have the Court

---

[37] See also Mr. Justice Brennan's warning about the dangers of electronic surveillance in his dissenting opinion in *Lopez* v. *United States*, 373 U.S. 427, 469-71 (1963).

turn its back on this country's tradition of barring military invasion into civil affairs—a tradition which dates to the complaint in the Declaration of Independence that the King had permitted the military to become "independent and superior to the civil power."

The plaintiffs for their part ask only that they be given their day in court so that they may have an opportunity to prove the Army's unconstitutional course of conduct and the injuries which they and other citizens have suffered as a result of it.[37a]

I.

Plaintiffs' Claims Are Justiciable and Ripe for Adjudication.

A. Plaintiffs' Claims Meet the Requirement of "Immediacy and Reality" and Are Ripe for Adjudication.

The government has persistently attempted to convert this case into something other than the case brought by the plaintiffs. This is not a case in which the plaintiffs challenge a threat of governmental action which could be characterized as hypothetical or speculative; this is not a case in which persons unaffected by governmental action challenge its potential effect on others; nor is this a case in which there is an alternative to present judicial review (Gov't. Brief, pp. 20-22). To the contrary, this case in-

---

[37a] It should be noted that the government's present position appears to be inconsistent with that of former Assistant Attorney General (now Mr. Justice) Rehnquist, who was reported to have stated to the Senate Judiciary Committee considering his nomination to this Court, when asked about this problem:

> If it could be shown that the surveillance had a 'chilling effect' on the willingness of people to express dissent then the courts should interfere with the surveillance. *New York Times*, November 5, 1971, p. 22.

volves concrete issues "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968)[38] If the plaintiffs have been prevented from developing the issues "with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests . . . . ", *United States* v. *Fruehauf,* 365 U.S. 146, 157 (1961), it is only because the District Court, at the government's instance, refused to permit it.

The facts to be developed at the hearing which plaintiffs have so far been denied will not merely speculate as to what might occur at some indefinite time in the future; the facts will demonstrate the existence and

---

[38] In the court below, the government's challenge to the justiciability of plaintiffs' claims focused not on the question of adversity, but on whether plaintiffs could "demonstrate that the following are judicially identifiable: a right in the plaintiffs, a duty of the defendants, a breach of that duty, and a remedy within the power of the court." (Government's brief in the Court of Appeals at 16). Reviewing the government's argument and plaintiffs' uncontested allegations in light of this Court's pronouncements on the question of justiciability, the court below properly concluded that:

> The Army has both a duty not to exceed its statutory authority and not to infringe First Amendment rights. Appellants [plaintiffs] claim the Army is doing both; their claim is therefore now justiciable. . . .
>
> The "judicial determination" of this alleged breach of duty is attainable by identifying those areas in which the Army's activity goes beyond that reasonably relevant to its statutory mission requirements, assuming, of course, that limitation of the Army's system to the extent found reasonably relevant to its civil disorder mission would not itself represent a significant instrusion into the protected First Amendment area. . . . (App. 141-142, n. 18).

The government appears to have abandoned this aspect of its justiciability argument before this Court.

operation of the Army's overbroad domestic intelligence system and its inhibitory effect on the present exercise of protected rights by plaintiffs and the class they represent. Thus, the federal courts are not merely being "invited to pass upon the constitutional validity of a [policy] which has not yet been applied or threatened to be applied . . . to [plaintiffs] or others in the manner anticipated." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 460 (1945). There is nothing "hypothetical," see *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947), about what the Army (or plaintiffs for that matter) has been doing which would justify waiting until facts present themselves upon which adjudication can then be made. This is not a case where "the mere existence of a statute, regulation or articulated policy" (Gov't. Brief, at 22), is challenged prior to its application or official interpretation, see *Alabama State Federation of Labor* v. *McAdory, supra.*[39] Instead, as Judge Wilkey properly noted for the court below, "the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [plaintiffs] and others similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment rights of free speech . . . ." (App. 139) (emphasis in original). It is the application and present operation of this system which distinguishes it from a case challenging the mere existence of a policy not yet applied.[40] See the dissenting opinion of Mr. Justice Harlan in *Poe* v. *Ullman*, 367 U.S. 497, 527-28 (1961).

---

[39] Compare *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

[40] Where, as here, the military policy under attack is actually being applied to the litigants, and the relevant facts can be readily

The government seems to be under the misapprehension that if governmental action infringes the constitutional rights of large numbers of people, as opposed to only one or a few, it somehow loses its justiciability. There is, of course, no such doctrine in our constitutional jurisprudence. Many of the historic constitutional decisions of this Court have in fact come in the context of cases in which a representative party asserted the common injury suffered by vast numbers of citizens. Certainly *Baker* v. *Carr*, 369 U.S. 186 (1962) and its progeny fall in this category, as do many of the racial segregation cases. See particularly *Evers* v. *Dwyer*, 358 U.S. 202 (1958), where this Court reversed the decision of a three-judge district court, which had dismissed the complaint on the ground that no actual controversy existed between an individual black citizen of the City of Memphis on the one hand and the public officials responsible for maintaining a segregated transit system on the other.

The government supports its justiciability argument by labeling plaintiffs' claims as "generalized grievance about the conduct of government" (Gov't. Brief, p. 15), lacking the specificity and particularity necessary to create the concrete adverseness required by the case and controversy limitation on the federal courts. In support of that asser-

---

ascertained, this Court can be "confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. at 106.

tion, the government cites the dictum of *Flast* v. *Cohen*, 392 U.S. at 106, a case much nearer to being a "generalized grievance" against government than the instant one,[41] and which this Court, by an 8 to 1 vote, nevertheless found to satisfy the case and controversy requirement.

The government's argument has no merit. Plaintiffs allege that the Army is engaged in an unconstitutional course of conduct which seriously abridges freedom of speech for all Americans, while imposing special burdens upon themselves. Assuming plaintiffs can prove those allegations (and all they ask of this Court is the opportunity to do so), their claim is no more a generalized grievance against the conduct of government than cases which alleged a practice of maintaining a racially segregated transportation system, *Evers* v. *Dwyer, supra;* a practice of discriminating against racial groups in voter registration, *United States* v. *Louisiana*, 380 U.S. 145 (1965); *United States* v. *Mississippi*, 380 U.S. 128 (1965); a practice of investigating the associations of bar applicants, *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154 (1971);[42] a practice of denying equality of voting rights by weighted voting, *Baker* v. *Carr, supra;* a practice of permitting radio broadcasts to the "captive audience" on District of Columbia transit buses, *Public*

[41] In *Flast*, the plaintiffs were challenging a nationwide governmental program which affected them equally with all other citizens. In the instant case, plaintiffs are part of the comparatively narrow group upon which the Army's surveillance system focuses.

[42] In *Wadmond*, the basic thrust of plaintiffs' attack on the bar's character investigation was "that New York's system by its very existence works a chilling effect upon the free exercise of the rights of speech and association of students who must anticipate having to meet its requirements." 401 U.S. at 158-9. Yet none of the three opinions written in that case questioned the justiciability of the claims.

Utilities Commission v. *Pollak,* 343 U.S. 451 (1952); and a practice of stopping and searching long-haired drivers on public highways in violation of the Fourth Amendment, *Lewis* v. *Kugler,* 446 F.2d 1343 (3d Cir. 1971). Yet in none of the above cases have courts had any difficulty adjudicating such "generalized" claims at the instance of one affected by the practice, or in the voter registration cases, the Attorney General on behalf of the affected class.

Indeed, none of the courts which have thus far considered claims similar to the one at bar have expressed any doubt as to their justiciability. While these courts have indicated a variety of views on the merits of a challenge to governmental surveillance of political activities, the challenge in each case was found to present a controversy "of the type which admit of judicial resolution," *Powell* v. *McCormack,* 395 U.S. 486 (1969). See, in addition to the opinion of the court below, *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal argued *sub nom. ACLU* v. *Laird,* 71-1159 (7th Cir. 1972);[43] *Yaffe* v. *Powers,* 40 L.W. 2494 (1st Cir. Jan. 26, 1972), reversing 71-514-J, (D. Mass. June 13, 1971), and remanding for class action determination and discovery proceedings; *Anderson* v. *Sills,* 56 N.J. 210, 265 A.2d 278 (1970), reversing 106 N.J. Super. 545 (Ch. Div. 1969), and remanding for an evidentiary hearing. See also *Aronson* v. *Giarusso,* 436 F.2d 955, 957 (5th Cir. 1971); *Fifth Avenue Peace Parade Committee* v. *Hoover,* 70 Civ. 2646 (S.D.N.Y. February 9, 1972); *Holmes* v. *Church,* 70

[43] *ACLU* v. *Westmoreland* is a limited version of this case. It is currently on appeal following dismissal after an evidentiary hearing for failure to prove any unconstitutional conduct on the part of the Army. Interestingly, the government is not challenging justiciability in that case, but is seeking to uphold the trial court's decision on the merits. In other words, the government is litigating there a claim it says is not justiciable here.

Civ. 5691 (S.D.N.Y. June 14, 1971) (order enjoining police surveillance of political activists "neither suspected of nor engaged in criminal activity"); *Vietnam Veterans Against The War* v. *Nassau County Police Dep't.*, —— F. Supp. —— (E.D.N.Y. 1971); *Avirgan* v. *Rizzo*, 70 Civ. 477 (E.D. Pa. 1970).

Nor is this case substantially different from a number of cases decided by federal courts challenging various police programs said to violate the constitutional rights of a broad class of citizens. The landmark decision in this area is, of course, *Hague* v. *CIO*, 307 U.S. 496 (1939), decided 33 years ago. See also *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir., 1966) (*en banc*); *Lewis* v. *Kugler, supra; Council of Organization on Philadelphia Police Accountability and Responsibility* v. *Tate* (E.D. Pa., Civ. No. 70-2430), discussed in *Lewis* v. *Kugler, supra*, at n. 5. And see Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 Yale L.J. 143 (1968).

All of the foregoing cases, which involved representative plaintiffs who shared a common constitutional injury with a large number of other citizens, were found to be justiciable. Indeed, some of those cases involved rights which do not stand as high in our scheme of constitutional values as the transcendent First Amendment freedoms at stake here; freedoms which are so "delicate and vulnerable," *NAACP* v. *Button*, 371 U.S. 415 (1963), that they require prompt adjudication whenever they are seriously threatened, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

The government seems to have fallen victim to its own assertions that plaintiffs object only to the threat of future injury to the rights of others. That, of course, is not plaintiffs' complaint at all. They complain of existing and continuing present injury to their own First Amendment rights

as well as to others similarly situated. They allege immediate and irreparable injury to rights of speech and association—basic guarantees of our Constitution which are "warrants for the here and now" and which, once abridged, are eternally lost and can never be restored. *Watson* v. *City of Memphis*, 373 U.S. 526, 533 (1963).

Viewed from that perspective, it cannot be seriously argued that plaintiffs' claims lack sufficient focus and concreteness. Indeed, they allege that the government is very concretely intruding upon their private and political lives, and their complaint focuses on the very concrete question whether the Army may collect and keep records of their constitutionally protected political activities. There is nothing abstract about such claims. They carry with them elements of "immediacy and reality" which are the core of the ripeness requirement. *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969), quoting from *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U.S. 270, 273 (1941).

Furthermore, as the court below noted, "because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action" (App. 142), the only alternative to present adjudication is continued abridgment of plaintiffs' rights. This Court has never permitted continued interference with First Amendment rights in the expectation that someone who has suffered even greater injury will come forward, since "a denial of constitutionally protected rights demands judicial protection. . . ." *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). While in a number of cases the Court has deferred a broadside attack on statutes allegedly infringing on First Amendment rights in favor of adjudication of only narrow questions, see, e.g., *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); or, even temporarily

avoided the issues in their entirety, see, e.g., *DuBois Clubs* v. *Clark*, 389 U.S. 309 (1967), each of these cases presented an adjudicative alternative.[44] There, the administrative process offered the possibility of developing an adequate record upon which subsequent constitutional adjudication could be based.

For all these reasons, this case should not be excluded from the very strong presumption in favor of reviewability of governmental actions infringing upon constitutional rights, Jaffe, Judicial Control of Administrative Actions (1965), p. 336, *et seq.*, cf. *Association of Data Processing* v. *Camp*, 397 U.S. 150, 157 (1970).

B. The Present Inhibiting Effect on the Exercise of First Amendment Rights Creates a Justiciable Controversy.

This case is not only presented "in a form historically viewed as capable of resolution through the judicial process," *Flast* v. *Cohen*, 392 U.S. at 95, but it also falls within the special adjudicative principles developed in recent years which enable a litigant to secure early protection for fundamental First Amendment rights without waiting "until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." *National Student Association* v. *Hershey*, 412 F.2d 1103, 1110 (D.C. Cir. 1969).

These special principles stem from the Court's recognition that governmental activity may run afoul of the First

---

[44] The same is true of cases such as *Younger* v. *Harris*, 401 U.S. 37 (1971), where "a proceeding was already pending in the state court," which offered the petitioner an opportunity to protect his rights. *Id.* at 49. See also the concurring opinion of Mr. Justice Brennan, pointing out that the petitioner in that case had already submitted his constitutional claims to the state court. *Id.* at 57n.

Amendment not because it is aimed directly at the regulation of free speech, but because in operation it may trigger a set of behavioral consequences which cause people to censor themselves in order to avoid trouble with the government. See, e.g., *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 66 (1971); *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. at 158-59; *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 609 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11, 16-19 (1966); *DeGregory* v. *Attorney General*, 383 U.S. 825, 828-29 (1966); *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-7 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 at 485-88; *Baggett* v. *Bullitt*, 377 U.S. 360, 378-79 (1964); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 544, 556-57 (1963); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); *Talley* v. *California*, 362 U.S. 60, 65 (1960); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958); *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958); *Sweezy* v. *New Hampshire*, 354 U.S. at 248; *Watkins* v. *United States*, 354 U.S. 178, 197-98 (1957).[44a]

These cases all focused upon the present diminution of First Amendment rights. In some of these cases First Amendment rights were chilled by criminal prosecution, *Dombrowski* v. *Pfister, supra*, or the fear of specific prosecution, *Zwickler* v. *Koota, supra*. In others, for example, it was the threat that those who insisted on exercising First

---

[44a] See also, *National Students Assoc.* v. *Hershey*, 412 F.2d 1103, 1111-1115 (D.C. Cir. 1969); *Wolff* v. *Selective Service Local Bd. No. 16*, 372 F.2d 817, 823-25 (2nd Cir. 1967); *Reed Enterprises* v. *Corcoran*, 354 F.2d 519, 522, 523 (D.C. Cir. 1965); *Hentoff* v. *Ichord*, 318 F. Supp. 1175, 1181-82 (D.D.C. 1970); *Straut* v. *Calissi*, 293 F. Supp. 1339, 1342-43 (D. N.J. 1968) (three-judge court); *Local 309* v. *Gates*, 75 F. Supp. 620, 624 (N.D. Ind. 1948); *Anderson* v. *Sills*, 56 N.J. 210, 221, 226-27, 265 A.2d 678, 684, 687 (1970).

Amendment rights (by refusing to sign an oath) would be deprived of their jobs, *Elfbrandt* v. *Russell, supra; Baggett* v. *Bullitt, supra,* and *Keyishian* v. *Board of Regents, supra,* or their tax exemption, *Speiser* v. *Randall, supra.* But in many of the cases in which this Court has developed the chilling effect doctrine, the burden upon First Amendment rights consisted of the general anxiety generated among citizens when the government attempted to collect and record the names of persons who were exercising their First Amendment rights in unpopular ways, *Lamont* v. *Postmaster General, supra; Talley* v. *California, supra,* or when the government sought to compel subsequent disclosure of First Amendment activities or associations, *Baird* v. *State Bar of Arizona, supra; DeGregory* v. *Attorney General, supra; NAACP* v. *Alabama, supra; Gibson* v. *Florida Legislative Comm., supra; Sweezy* v. *New Hampshire, supra; Watkins* v. *United States, supra.*[45]

---

[45] The court below, while finding plaintiffs' claims justiciable, categorized cases such as *Lamont, Talley, NAACP* v. *Alabama,* and *Sweezy,* as "[c]ases involving some element of government compulsion, either to testify regarding one's political ideas or beliefs, or to identify oneself in order to exercise First Amendment rights" (App. 138, n. 14). Plaintiffs believe this group of cases stands for a more subtle point, with its roots at the core of the First Amendment: that Lamont (and more especially "those who have sensitive positions," 381 U.S. at 307) not be singled out by an ever present government as one desiring to receive Communist political propaganda; that Talley, though acting openly in public, may yet preserve his anonymity from an ever present government; that members of the NAACP, though freely choosing to associate together, may too preserve their anonymity from an ever present government; and that Sweezy and Watkins may preserve the secrecy of their ideas and ideals from the ever present government. It was the chilling effect likely to be caused by the government's gathering of information about First Amendment activities which was the essence of the injury in each of those cases. See generally, Note, The Chilling Effect in Constitutional Law, 69 Colum. L.R. 808 (1969).

"The peculiar feature of suits alleging a First Amendment chilling effect, . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interests if he *does not* speak or act as he says he wants to." *NSA* v. *Hershey, supra,* 412 F.2d at 1111 (emphasis in original). Thus, last term in the *Wadmond* case, the Court entertained on the merits a claim that New York's system for admitting persons to the bar worked a

> "chilling effect" upon the free exercise of the rights of speech and association of students who must anticipate having to meet its requirements. (401 U.S. at 158-59)

Despite the fact that appellants there challenged the mere existence of the system, this Court entertained the suit on the merits, as did the three-judge district court, without questioning its justiciability.[46] Notably, the government has failed even to mention this most recent example of the Court's willingness to entertain suits based on a chilling effect resulting from overbroad governmental programs. Here, the case is much stronger, since plaintiffs allege and are prepared to show that the Army's surveillance system is actually being applied to the detriment of their First Amendment rights.[47]

---

[46] The District Court did address the question of "standing" and found the plaintiffs satisfied that requirement. 299 F. Supp. 117, 122-3 (S.D.N.Y. 1969).

[47] The fear expressed by the court in *NSA* v. *Hershey, supra,* that "[o]ne result of adjudicating wherever there is a chill may well be to require resolution of complex questions without the beneficial focus afforded by adversary argument trained upon a concrete factual dispute," 412 F.2d at 1114, is not operative under the circumstances of this case, since constitutional adjudication can be made with "the beneficial focus afforded by adversary argument trained upon a concrete factual dispute." *Id.*

Plaintiffs fear that jobs will be lost or denied as a result of military dissemination of information about their political activities and associations and they are therefore inhibited in the free and full exercise of their First Amendment rights (App. 10). They allege that others less courageous than themselves are deterred from associating with them and joining in common political programs for fear that they too will be ensnared in the military's data collection and dissemination program (App. 10-11).

1. ***This Court has often taken notice of the chilling effect upon free speech and association caused by overbroad governmental activities.***

Taking its cue from the dissent in the court below, the government argues that the plaintiffs' claims derive from "highly visionary apprehensions that are admittedly based on abstractions which cannot be comprehended or are beyond human experience and understanding" (Govt. Brief, p. 28). In stark contrast to this characterization of the complaint, the majority below held that the Army's practice of monitoring civilian politics is a "threat to civil liberties" and "a deterrent on the exercise of the constitutional right of free speech," and that the plaintiffs' claims should therefore be considered on their merits by the District Court (App. 144).

The decision of the court below is in fact consistent with the common knowledge, often expressed by this Court, that certain overbroad governmental activity can result in "a present inhibition of lawful behavior and of First Amendment rights" (App. 139). Indeed, this Court has reached that conclusion in many cases over the past two decades by taking notice of the deterrent effects of a variety of

other governmental programs, some of which were not as alarming as the Army's surveillance program. They have included (a) attempts by state legislatures and other official bodies to compel disclosure of membership in and to obtain membership lists of political organizations; (b) statutes regulating the distribution and exhibition of literary materials on the grounds of obscenity; (c) statutes or regulations requiring persons exercising their rights of free speech in particular ways to identify themselves to government officials; (d) attempts by government employers to extract loyalty oaths from their employees; and (e) prosecution of persons for engaging in activities protected by the First Amendment. On numerous occasions the Court has held that the allegations of chill resulting from such overbroad governmental activities not only satisfied the requirements of justiciability and standing, but also were sufficient to establish unconstitutionality itself.

The issue upon which the Court fixed its attention in each case was the effect which governmental interference with speech and association was likely to have on the willingness of other people to engage in constitutionally protected expression. In each of these cases the constitutional evil was the chill generated by the government in the political marketplace. From that perspective, the claim before the Court that the Army's surveillance system violates First Amendment rights is indistinguishable from other cases in which "this Court recognize[d] that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958).

a. *Compulsory Disclosure of Associations.* The most striking examples of the Court's acknowledgment that governmental activity can chill the exercise of First Amendment rights are cases where the government has attempted to compel disclosure of membership in controversial political organizations or to compile lists of the members of such groups.

In *Shelton* v. *Tucker,* 364 U.S. 479, 486 (1960), the Court struck down a state statute that required teachers to file affidavits listing their organizational memberships. Writing for the majority, Mr. Justice Stewart characterized the constitutional harm as a chilling effect on the associational freedom of teachers caused by their fear of public exposure:

> The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless. Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy.

A similar governmental deterrence of freedom of association was the basis for Mr. Justice Black's dissent in *Konigsberg* v. *State Bar,* 366 U.S. 36, 73-74 (1961), a case involving the power of a state bar committee to question applicants on their membership in controversial organizations:

> If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission into the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid association with any organization that advocates anything at all somebody might

> possibly be against, including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment.

While the majority in *Konigsberg* did not take issue with the dissent's characterization of chilling effect, it decided that in that instance the impact on First Amendment rights had to give way to the state interest in regulating admissions to the bar.[47a] Indeed, the view expressed in the *Konigsberg* dissent, became the view of the Court last term in *Baird* v. *State Bar of Arizona,* 401 U.S. 1, 6 (1971), where Mr. Justice Black, now writing for the majority, asserted that inquiries into political associations by bar committees would "discourage citizens from exercising rights protected by the Constitution."

This Court has been even more rigorous in protecting associational freedom from the chill of governmental activity when membership lists of controversial organizations have been subjected to the threat of public exposure by the government. Mr. Justice Harlan spoke for a unanimous court, for example, in reversing a contempt conviction for failure to produce organizational membership lists in *NAACP* v. *Alabama,* 357 U.S. 449, 460-61 (1958):

> [I]t is immaterial whether the beliefs sought to be advanced by the association pertain to political, economic, religious or cultural matters; . . . state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Facing the same issue in *Bates* v. *City of Little Rock,* 361 U.S. 516, 523 (1960), a unanimous Court again held that

---

[47a] This case, of course, has not yet progressed to the point where such a consideration of the merits is appropriate.

the disclosure of membership lists of organizations engaged in disseminating ideas and airing public grievances may not be compelled:

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.

See also *Louisiana* v. *NAACP,* 366 U.S. 293, 297 (1961) ("regulatory measures . . . , no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights").

In all these cases the Court found that the government's demand for information about political association and membership in unpopular groups would chill such association. The finding was based upon an observation that the government's influence on political controversy is often greater than would appear on the face of a particular governmental regulation, and that the exposure of unpopular persons or groups would often serve to increase their unpopularity and deter others from joining or associating with them. Cf. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250-51 (1957). There is no reason to suspect the chill is any less real when people see the armed forces gathering this information. It is a palpable warning that government authority considers such organizations and individuals suspect. In *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539, 556-57 (1963), the Court explained in detail the principle it had applied in earlier membership disclosure cases:

> While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of

> persons espousing beliefs already unpopular with their neighbors and *the deterrent and "chilling" effect* on the free exercise of constitutionally enshrined rights of free speech, expression, and association *is consequently the more immediate and substantial.* (Emphasis added.)

b. *The Censorship Cases.* In cases involving censorship, obscenity, and libel laws, the Court has also recognized the deterrent or chilling effect such laws and programs have on freedom of expression and on the public's access to political and literary ideas protected by the First Amendment.

In *Smith* v. *California,* 361 U.S. 147 (1959), the Court held unconstitutional an obscenity statute which imposed strict liability on booksellers. Observing that the bookseller's "timidity in the face of his absolute criminal liability . . . would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly," 361 U.S. at 154, the Court took notice that such a deterrent on booksellers operated as an inhibition on the exercise of First Amendment rights by the entire reading public. Four years later, in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 71 (1963), holding a state commission's informal censorship practices to be "radically deficient," the Court warned:

> It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. [372 U.S. at 66.]

Such "barely visible encroachments" have also been found by the Court to result from the operation of state libel laws. Speaking for the majority in *New York Times* v.

Sullivan, 376 U.S. 254, 278 (1964), which relieved a newspaper from liability for its criticism of public officials, Mr. Justice Brennan touched upon the underlying constitutional infirmity:

> [T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

In all the censorship cases the anticipated chill on First Amendment rights compelled the Court to hold that judicial protection must be available at the earliest point at which the exercise of constitutional rights might be deterred. For example, in holding a state motion picture censorship statute invalid as a prior restraint on freedom of expression in *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965), the Court warned of the dangers of inadequate procedural safeguards for reviewing the censor's determination, since "it may take very little to deter exhibition."

c. *Self-Identification and Registration Requirements.* The Court struck down another kind of prior restraint in *Talley* v. *California*, 362 U.S. 60 (1960), where an ordinance requiring the author of a political handbill to identify himself was held to be invalid on its face. Speaking of the deterrent effect of the ordinance, Mr. Justice Black observed:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. . . . [T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified . . . .

> [I]dentification and fear of reprisal might deter perfectly peaceful discussion of public matters of importance. [362 U.S. at 64-65.]

A challenge to a similar statute prohibiting the distribution of anonymous political handbills was held to be justiciable in the face of abstention arguments in *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967), where the Court noted that

> . . . to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.

The evil of compulsory self identification was also considered by the Court in the review of a federal statute placing an affirmative obligation on a person to express a desire to receive in the mail what had been determined by postal authorities to be "communist propaganda," *Heilberg* v. *Fixa*, 236 F. Supp. 405 (N.D. Cal. 1964), *aff'd sub nom. Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The lower court in *Heilberg* had observed that the claim that the government could not compile political lists of names was neither abstract nor visionary:

> Similar lists under earlier non-statutory screening programs were routinely turned over to the House Committee on Un-American Activities . . . . There are no . . . assurances that this information will not be made available in the future . . . .
>
> Moreover, the practices . . . cannot help but deter the free expression of ideas. [236 F. Supp. at 409.]

Affirming the lower court in the same spirit, this Court took note of the chilling effect on First Amendment rights that the regulation's affirmative obligation was likely to cause:

> This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. . . . Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." [381 U.S. at 307.]

Mr. Justice Brennan's concurrence reminded that "inhibition as well as prohibition against the exercise of First Amendment rights is a power denied to government." *Id.* at 309.

These cases are conceptually indistinguishable from the case at bar. None of the regulatory schemes included especially onerous requirements and, moreover, they dealt with activities that were in no way private or secret. The essential vice was that persons who wanted to exercise First Amendment rights had to register their names with a government agency. This Court correctly perceived that many persons other than the individual complainants, particularly those in sensitive positions, might be deterred from doing what they had every right to do.

(d) *Loyalty Oaths.* This Court has also taken notice of the chilling effect of free speech when loyalty oaths are administered to teachers and other public employees. The constitutional defect in a loyalty oath is not only its impact on those whose sensibility forbids them from subscribing to sometimes vague and far-reaching statements, but its ultimate effect on free political expression—the chill or inhibition placed upon the exercise of First Amendment rights by all members of the affected community. See generally Askin, *Loyalty Oaths in Retrospect: Freedom and Reality,* 1968 Wisc. L. Rev. 465.

In *Weiman* v. *Updegraff*, 344 U.S. 183 (1952), the Court held that a loyalty oath for state employees violated their rights of free association and due process. Mr. Justice Black, in his concurring opinion, described the broad danger to society from such laws:

> Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. [344 U.S. at 193.]

Also concurring, Mr. Justice Frankfurter warned that:

> Such unwarranted inhibition upon the free spirit of teachers affects not only those who . . . are immediately before the Court. It has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. [344 U.S. at 195.]

Similarly, in *Speiser* v. *Randall*, 357 U.S. 513 (1958), the Court held that denial of state tax exemption for refusing to take a loyalty oath violated the First Amendment.

> The man who knows that he must bring forth the proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. [357 U.S. at 526.]

Three years later, the Court struck down a loyalty oath for school teachers on vagueness grounds in *Cramp* v. *Board of Instruction*, 368 U.S. 278, 287 (1961), again noting the chill caused by such regulation:

> The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.

In *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) the Court reflected upon its earlier decisions and further identified the nature of the First Amendment inhibition resulting from a loyalty oath program. Speaking for the majority, Mr. Justice White explained:

> Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited. (377 U.S. at 372.)

Finally, in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 607 (1967), the Court struck down another state loyalty oath for teachers as vague and overbroad, stressing that:

> [*T*]*he stifling effect* on the academic mind from curtailing freedom of association in such a manner *is manifest, and has been documented in recent studies.* [385 U.S. at 607 (emphasis added).]

(e) *Penal Statutes.* The chilling effect doctrine has been utilized not only to strike down substantive legal pro-

visions, but also to expedite the point at which a controversy becomes ripe for adjudication. See generally, Comment, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969). The Court has permitted a departure from the normal rules of non-interference with state criminal prosecutions in situations where "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of . . . prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965).

The Court in *Dombrowski* was expanding on ideas earlier articulated in Mr. Justice Brennan's opinion in *NAACP* v. *Button*, 371 U.S. 415 (1963):

> [T]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. [371 U.S. at 432-433.]

The chilling effects resulting from the government regulations and programs in most of the foregoing cases were no less imaginary, speculative, visionary, abstract or indefinite than plaintiffs' allegations in this case. Indeed, since this case involves conduct not by civilian agencies of government, but by the United States Army, Judge Wilkey correctly noted that it presented a much more serious "deterrent on the exercise of the constitutional right of free speech" than the typical First Amendment case (App. 145).

Indeed, lower federal courts have noted in several cases that mere physical surveillance of protected activity by

agents of some controlling authority—i.e., mere watching unrelated to an ongoing program of data collection and recordation as we have here—is itself chilling enough to warrant judicial intervention. See *Furniture Workers Local 309* v. *Gates*, 75 F. Supp. 620 (N.D. Ind. 1948); *Bee See Books* v. *Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968); *cf. United States* v. *McLeod*, 385 F.2d 734, 750 (5th Cir. 1967). See also *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

The chilling effect of surveillance has been acknowledged even by the current Administration. Testifying before the Constitutional Rights Subcommittee's inquiry into government data banks, in his capacity as Assistant Attorney General, Mr. Justice Rehnquist had the following dialogue with Senator Ervin (Ervin Hearings Part I, pp. 621-622):

> Senator Ervin: Don't you think—most people are sort of afraid of government surveillance . . . ?
>
> Mr. Rehnquist: I do not doubt a number are, Mr. Chairman. . . .
>
> Senator Ervin: Very well. You have no opinion of whether it does exercise an intimidating influence on people for them to be even under the surveillance of the federal law enforcement officials, or to suspect that they are?
>
> Mr. Rehnquist: I do not doubt that is the case with many people. But I do not think you can lay it down as a general principle.

Of course, plaintiffs do not suggest that every single person in the country is chilled, nor that all those who are chilled labor under the same degree of apprehension or intimidation. But the First Amendment is not reserved for heroes. When "many people" are chilled, a justiciable

controversy exists, so long as the other requirements of the justiciability doctrine are satisfied.

2. *Social science data supports the Court's recognition of the chilling effect of overbroad governmental programs.*

This Court's assumptions in the foregoing cases are consistent with the common knowledge and understanding of the general public, for "a court must be blind not to see," as Chief Justice Taft taught us in a famous opinion, what "all others can see and understand. . . ." *Bailey* v. *Drexel Furniture Co.*; 259 U.S. 20, 37 (1922). In addition, these judicial assumptions are supported by a vast body of social science data and literature, the general thrust of which we set out in some detail in the Appendix[47b] to this brief.

[47b] Courts, of course, can take notice of social science facts and have done so on many occasions. As Judge Learned Hand pointed out over sixty years ago in *Parke-Davis & Co.* v. *H. K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D. N.Y. 1911), courts have a duty to provide themselves with the best information and expert opinion available on technical subjects:

> How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.

This Court has frequently looked to social science data even when deciding the *merits* of constitutional questions, and even when the data was not included in the record made below. *Powell* v. *Texas*, 392 U.S. 514 (1968).

Robinson v. *California*, 370 U.S. 660 (1962) cites six social science and medical articles for the proposition that narcotic addiction can be contracted "innocently" and is not always contracted in a criminal manner, *Id.* at 667, n. 9, and in his concurring opinion Mr. Justice Douglas quotes extensively from articles and studies done in the area of narcotics addiction, *Id.* at 670-71.

Similarly, in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), not only was there expert social science testimony on the record

The Appendix demonstrates that the occurrence of chill is a recognized and normal response to certain kinds of social situations which people have learned to categorize as threatening. Such a response is known as avoidance behavior, and can be learned either directly, as a result of a person's own past experience, or vicariously. Avoidance behavior has been found to be of long duration since it is more difficult to extinguish than other forms of learned behavior.

Among the social-psychological factors which generate the response of chill to the kind of military surveillance challenged in the instant case are: the power or authority of the surveillance agent to implement sanctions; the anxiety which occurs when a subject's behavior is being evaluated; the removal of anonymity; and the uncertainty or ambiguity of the situation.

---

but a separate statement by 32 social scientists was submitted to the Court as an appendix to appellants' briefs. The Court cited several studies from the material, and noted that the negative effects of segregated facilities on black children had been shown experimentally. *Id.* at 494, n. 11.

Finally, in *Muller* v. *Oregon*, 208 U.S. 412, 419 (1908), a suit challenging the constitutionality of an Oregon statute which limited the employment hours of women, the Court said:

> It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources.

The court then cited in a footnote part of the brief filed for the defendant by Louis D. Brandeis. *Id.* at 419, n. 1:

> In light of the large number of cases in which this and other federal courts have noticed social science facts in deciding the merits of constitutional issues, it is certainly appropriate to consider such material for the relatively narrow purpose of determining that a controversy is justiciable—whether or not the Court agrees with the Court of Appeals that plaintiffs ultimately will have to offer evidence of "inhibiting effect" in order to prevail on the merits (App. 148, para. 3 of remand instructions).

Another important finding is that political behavior which was formerly considered legitimate becomes stigmatized and redefined as illegitimate as a result of such government surveillance.

Thus when a person feels he might be the subject of surveillance by a powerful military authority and thus be stripped of his behavioral anonymity, he would be expected to experience anxiety about possible consequences and to become more apprehensive about engaging in activities which he feels would be disapproved. Furthermore, the very uncertainty of the existence of such surveillance and its potential consequences would only heighten that anxiety.

The subject himself may even redefine his own views as a result of the stigma he feels is attached to those views by the government's apparent disapproval of them.

This chill process is reinforced by knowledge that in the past specific negative consequences were visited upon persons who became subject to such government investigation and surveillance.

These principles were illuminated by several studies of the effects of government surveillance and investigation in the United States during the 1950s. The studies found the following specific inhibiting effects on government employees: they stopped subscribing to certain periodicals, they avoided discussing politics in public, they did not join legitimate political organizations, and they were stigmatized if investigated. The subjects of these investigations reported that they suffered loss of health and tarnished reputations, and there was no relief from these "sanctions" even if they were cleared.

The fundamental conclusion of these studies was that the subjects were chilled because they responded to the situation as defined by the prevalent atmosphere or climate of thought. In responding to this global situation, people began to fear that they must adhere to more specific and concrete codes of behavior than those which they had traditionally observed. After this occurred, people often internalized the newly accepted standard or code. As one of these studies concluded:

> (T)he hazards of being investigated—even if one is subsequently cleared—are so great that individuals are induced to limit their behavior by avoiding (or trying to avoid) anything that might conceivably arouse anyone's suspicion and thus lead to charges and an investigation. (Jahoda and Cook, *Security Measures and Freedom of Thought,* 61 Yale L.J. 296, 318 (1952).)

3. Plaintiffs are, at a minimum, entitled to a hearing on the existence of chilling effect, since the Court may not judicially notice the absence of chill at this stage of the proceedings.

Plaintiffs contend that, as to the threshold question of justiciability, this Court must take as true plaintiffs' factual allegations of chilling effect caused by the Army's conduct.[47c] However, even if the Court is unwilling to assume the validity of plaintiffs' allegations relating to chill, the

---

[47c] Plaintiffs further contend that after an evidentiary hearing detailing the scope of the Army's intrusion into First Amendment activities, it would be consistent with prior decisions of this Court for the trial court, based upon inferences drawn from the proof, to conclude that the Army's intelligence-gathering program generates a constitutionally forbidden chilling effect.

Court may not take judicial notice that there is *no* chill—particularly in the face of the evidence to the contrary cited in the Appendix.

Yet, for the Court to accept the government's argument that the present claim is not justiciable, it would have to take just such notice, that is, it would have to conclude, either implicitly or explicitly, that under no set of circumstances could the Army's widespread political intelligence gathering operation cause a significant chill on the ability of plaintiffs and their class to exercise First Amendment rights. Consequenly, if the Court declines to accept plaintiffs' allegations of chilling effect, the only proper procedure is to remand the case to the trial court for proof on that issue, as well as on the scope of Army surveillance.

In *Law Students Civil Rights Research Council* v. *Wadmond, supra,* 401 U.S. at 167, the Court, in an opinion by Mr. Justice Stewart, concluded:

> We are not persuaded that careful administration of such a system as New York's *need result* in chilling effects upon the exercise of constitutional freedoms (emphasis added).

But that conclusion was based upon a full evidentiary hearing in which plaintiffs had the opportunity to present whatever evidence they desired, including evidence of chill. The plaintiffs here insist that, at the very least, they are entitled to the same opportunity.

C. Plaintiffs Assert Justiciable Claims of Invasion of Privacy.

In addition to the claims of invasion of their First Amendment rights of speech, association and assembly, plaintiffs also seek relief from defendants' invasion of their privacy (App. 11). The plaintiffs seek, inter alia, a judicial order prohibiting the Army from surveilling and monitoring their personal activities and disseminating information about them and requiring the destruction of whatever files and dossiers the Army presently maintain. However plaintiffs' right of privacy (and defendants' duty not to invade it) might ultimately be defined, there can be little argument over the justiciability of such claims, which is the only question presently before this Court. Certainly plaintiffs have a right to hearing and judicial determination as to whether their right of privacy has in fact been unnecessarily invaded by Army surveillance. See generally Miller, *The Assault on Privacy* (1971); Note, *Police Undercover Agents: New Threat to First Amendment Freedoms,* 37 Geo. Wash. L. Rev. 634 (1969); Beaney, *The Right to Privacy and American Law,* 31 Law and Contemporary Problems 253 (1966); Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's, Part II—Balancing the Conflicting Demands of Privacy, Disclosure and Surveillance,* 66 Colum. L. Rev. 1205 (1966).

Just last term Mr. Justice Stewart wrote:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. [*Coolidge* v. *New Hampshire,* 403 U.S. at 453, quoting *Wolf* v. *Colorado,* 338 U.S. 25, 27 (1949).]

This case, no less than *Coolidge*, raises questions concerning the permissible scope of police intrusion into the right of privacy.

The "right to be let alone" was called by Mr. Justice Brandeis "the most comprehensive of rights and the right most valued by civilized men," *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). It has more recently been described by a member of this Court as "the beginning of all freedom." *Public Utilities Commission* v. *Pollak*, 343 U.S. at 467 (Douglas, J., dissenting).

While the right to privacy covers a multitude of situations, compare *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), with *Public Utilities Commission* v. *Pollak*, *supra*, cf. *Katz* v. *United States*, 389 U.S. 347 (1967), our courts have, at least in recent years, generally recognized that public or private spying upon an individual's activities gives rise to a justiciable claim for judicial protection which requires a full hearing on the facts before a decision can be reached on the merits of the plaintiff's petition for redress. Cf. *York* v. *Story*, 324 F.2d 450 (6th Cir., 1963), cert. denied, 376 U.S. 939 (1964).

Giancana v. *Johnson*, 335 F.2d 366 (7th Cir., 1964), involved a suit to enjoin the Federal Bureau of Investigation from overt surveillance of an alleged underworld leader. While the 2-1 majority of the Court of Appeals dissolved the lower court's injunction on the ground that the complaint had failed to satisfy the $10,000 amount in controversy requirement of 28 U.S.C. 1331, the court considered the question of an unwarranted invasion of plaintiff's privacy justiciable:

> Courts may not treat as a mere technicality the jurisdictional amount essential to the "federal question" jurisdiction, even in this case where there is an allegedly unwarranted invasion of plaintiff's privacy. 335 F.2d at 368.

In dissent, Judge Swygert indicated that the question of the right of privacy is justiciable under the Fourth and Fifth Amendments, citing the conclusion of the lower court:

> That the rights under the Fourth and Fifth Amendments to which the plaintiff is entitled as a citizen of the United States and a person within the jurisdiction of the United States are: (1) The right to be free from arbitrary intrusion into his privacy by agents of the Federal Government, without due process of the law; (2) The right to be free from deprivation of his liberty and freedom by agents of the Federal Bureau of Investigation without due process of law; and (3) the right to be let alone by agents of the Federal Bureau of Investigation unless there be reasonable grounds to justify interference of plaintiff's liberty and freedom by said agents. [335 F.2d at 371.]

The right of privacy with which *Giancana* was concerned has also been recognized as a common law right which gives rise to an action by one private individual against another. See 14 A.L.R.2d 750 and 13 A.L.R.3d 1025. See also *Nader* v. *General Motors Corp.*, 24 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970). Cf. *Afro-American Publishing Co.* v. *Jaffee*, 366 F.2d 649, 653 (D.C. Cir. 1966). Such common law rights would of course also be justiciable as against public agencies, notwithstanding the special defenses the latter might assert. Those defenses do not involve the question of justiciability now before this Court.

The arrest record expungement cases also support plaintiffs' contention that their privacy claims are justiciable. These cases recognize that police must justify by some important public need the retention and/or distribution of information on persons who were arrested but not convicted of crimes. In *Morrow* v. *District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969), the court commented that it was an "unjustified invasion of privacy" for police to disseminate information about innocent persons who had been arrested. In *United States* v. *Kalish*, 271 F. Supp. 968, 970 (D.P.R. 1967), the court asserted:

> [W]hen an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest, fingerprints and a rogue's gallery photograph. . . . *The preservation of these records constitutes an unwarranted attack upon his character and reputation and violates his right of privacy;* it violates his dignity as a human being. (Emphasis supplied.)

The unjustified threat to the individual and the inherent dangers to the right of privacy caused when police retain records of innocent persons was again noted by the District of Columbia Circuit in the recent case of *Menard* v. *Mitchell*, 430 F.2d 486, 490-91 (1970). In the opinion and order of the district court on remand, 328 F. Supp. 718 (D.D.C. 1971), moreover, the court observed:

> The increasing complexity of our society and technological advances which facilitate massive accumulation

and ready regurgitation of far-flung data have presented more problems in this area, certainly problems not contemplated by the framers of the Constitution. These developments emphasize a pressing need to preserve and to redefine aspects of the right of privacy to insure the basic freedoms guaranteed by this democracy. (328 F. Supp. at 725. See footnote 4 of the opinion for a catalog of the inherent dangers of personal data systems.)

See also, *Wheeler* v. *Goodman*, 306 F. Supp. 58, 66 (W.D. N.C. 1969); *Kowall* v. *United States*, 9 Cr. L. Rep. 2482, 2483 (W.D. Mich., 1971); Comment, *Constitutional Law—Maintenance and Dissemination of Records of Arrest Versus the Right to Privacy*, 17 Wayne St. L. Rev. 995 (1971).

As suggested earlier, the right of privacy has many faces and has never been clearly defined by our courts. But as the foregoing cases demonstrate it certainly reaches as far as governmental gathering and recording of information about an individual's words and activities both in private and public. The Fourth Amendment "protects people, not places." *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

If justiciable claims are created by the foregoing invasions of the more ubiquitous right to privacy involved in those cases, how much more compelling are plaintiffs' claims, involving as they do the much more specific right of privacy and anonymity of political action and the "vital relationship between freedom to associate and privacy in one's association" firmly grounded in the First Amendment. *NAACP* v. *Alabama*, 359 U.S. 449, 462 (1958). See also *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960).

In any case, the circumstances under which "the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Coolidge* v. *New Hampshire*, 403 U.S. at 453.

II.

The Justiciability of Plaintiffs' Claims Is Enhanced Because the Military Has Exceeded Its Constitutional and Statutory Authority and Intruded Into Civilian Affairs.

A. This Court should not "stay its hand" and avoid deciding that plaintiffs' ultra vires claims are justiciable.

The government in its brief makes the beguiling argument that even if the plaintiffs can establish their allegations of constitutional injury, the military activity about which they complain has been authorized by statute and in any case is not amenable to judicial review. (Gov't. Brief, pp. 29-33.) Thus while conceding that the court below may have been correct in finding that "there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action" (*Id.*, at 30; App. 142), the government attempts to escape Judge Wilkey's conclusion that "the issue can be considered justiciable at this time" (App. 142) by retreating to an argument which it hopes is beyond judicial scrutiny:

> The Army is not a mere interloper in the civil disturbance field. Its mission there is specifically authorized by statute . . . . [T]hat is perhaps sufficient reason for the judicial branch to stay its hand, for it means that judicial intervention is in fact not necessary to protect those on whose behalf these respon-

dents have purported to sue. The challenged activity of the Executive Branch has already been reviewed.[48]

This argument is extraordinary. In translation, it appears to mean that merely by citing a statute to show that Congress has "authorized" governmental activity which is alleged to have an injurious effect on the constitutional rights of citizens, the government can foreclose judicial review of the challenged activity. Quite apart from the fact that the statutes it relies upon plainly do not authorize the challenged activity, as discussed below, the government's claim that this case is not justiciable because Congress has preempted the issue flies in the face of one hundred and seventy years of judicial review of legislative as well as executive action, when such action is challenged on constitutional grounds. As Chief Justice Marshall wrote in answer to an argument similar to the one urged by the government upon this Court, "[t]hose who controvert the principle, that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes to the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. . . . It would declare, that if the legislature shall do that which is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual." *Marbury* v. *Madison,* 1 Cranch 137, 2 L. Ed. 60 (1803).

---

[48] Gov't. Brief, pp. 30, 34. The government is referring to the Ervin Hearings. Both the government and the plaintiffs urge the Court to take judicial notice of the Hearings, although for different reasons.

B. The statutes cited by the government do not authorize political surveillance by the Army.

The statutes cited by the government do not authorize Army surveillance of domestic politics, and therefore are not responsive to the plaintiffs' allegation that the Army has acted "without any lawful statutory authority" (App. 11).

10 U.S.C. sections 331-334 provide for the domestic use of the armed forces by the President "to enforce the laws of the United States" [49] or "suppress insurrection" [50] when it becomes impossible for local and state authorities to enforce the laws "by the ordinary course of judicial proceedings." [51] See *Alabama* v. *United States,* 373 U.S. 545 (1963); *Presser* v. *Illinois,* 116 U.S. 252 (1886); *In Re Charge to the Grand Jury,* 62 F. 828 (D. Ill. 1894). Since the statutes empower the military to act only after a particular insurrection has grown beyond the capabilities of the civilian police,[52] or when the civilian police have refused to enforce the federal laws, *Alabama* v. *United States, supra,* it is extraordinary that the government should characterize the Army's domestic intelligence requirements as "similar to those . . . for local police surveillance in similar situations" (Gov't. Brief, p. 32).

The statutes contain no express or implied reference to the Army's authority to investigate the lawful political

---

[49] 10 U.S.C., §332.

[50] 10 U.S.C., §333.

[51] 10 U.S.C., §332.

[52] Indeed, no troops or militia can be employed by the President under this chapter unless and until "he shall by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time." 10 U.S.C., §334.

activity of civilians and to collect, maintain and distribute reports on the First Amendment activities of plaintiffs and their class.[53] Indeed, since protection of the political freedom of citizens and organizations forms the very essence of constitutional liberty and security, *Bates*

---

[53] The government suggests in its brief, at p. 32, that even if no express authority can be found in the statutes for the Army's surveillance activities, the Army acted pursuant to the recommendations of the President's National Advisory Commission on Civil Disorders.

This contention is no more supportable than the statutory claim. First, as the court below correctly recognized, the Commission's report recommended improvements in police—not military—intelligence:

> "Intelligence—The absence of accurate information both before and during a disorder has created special control problems for the police. Police departments must develop means to obtain adequate intelligence for planning purposes, as well as on-the-scene information for use in police operations during a disorder" (App. 137).

Nor was the Commission equivocal about this recommendation. In Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, for example, the Chairman of the Commission, Judge Kerner, clearly distinguished the Commission's recommendations from the subsequent actions of the Army in the following colloquy with Senator Kennedy:

> "Senator KENNEDY. In the work of another subcommittee of this Judiciary Committee, Senator Ervin's Constitutional Rights Subcommittee, we have been looking into surveillance of individuals by various governmental agencies. There are public officials attending public meetings being surveilled by the U.S. Army . . . . We have had the observation during the course of responses by varying individuals that this is almost following in the spirit of the Kerner Commission . . . .
>
> I am just wondering what kind of comments you would like to make about this, if any.
>
> Judge KERNER. I would like to say we had relationships with the service, Defense Department, but solely and only in the area of proper training. *We certainly did not suggest in any wise, directly or indirectly, the matter in which Senator Ervin is presently checking and investigating.*" *Id.*, at 22-23 (proceedings of May 25, 1971) (emphasis supplied).

v. *City of Little Rock, supra; NAACP* v. *Alabama, supra,* it is difficult to imagine a construction that would do more violence to the statutory language than the one urged by the government. That the Executive has statutory as well as constitutional authority to combat *illegal overt acts* amounting to "insurrection" [54] *after* the failure of civilian authority, does not mean that the Army can spontaneously[55] institute a sweeping domestic intelligence operation which, the evidence will show on remand, has become "a dragnet which may enmesh anyone." *Herndon* v. *Lowry,* 301 U.S. 242, 263 (1937).

If there were any doubt about the meaning of the statutes, it would be resolved by the decision of this Court in *Schneider* v. *Smith,* 390 U.S. 17 (1968); which dealt with a statute by which Congress had authorized the President to safeguard vessels against sabotage and other subversive conduct. Purporting to act under that authority the President promulgated regulations authorizing the Coast Guard Commandant to gather information about the political beliefs and associations of civilian seamen. The Court held that the statute did not contemplate such broad investigations:

---

[54] Cases arising under 10 U.S.C., §333 construe insurrection as "a rising against civil or political authority—the open and active opposition of a number of persons to the execution of law in a city or state." *In re Charge to the Grand Jury, supra,* at 830. See also *Presser* v. *Illinois, supra.*

[55] The government attempts to convey the impression in its brief, at p. 30 n. 25, that Army surveillance was the creation of several Executive Orders. The three 1968 Orders cited, however, involved the callup of federal troops and have nothing whatever to do with Army intelligence. Furthermore, the evidence presented by the Army to the Senate Subcommittee on Constitutional Rights overwhelmingly supports the conclusion that the Army acted on its own in developing a domestic political surveillance program. (See n. 21, *supra.*)

> The present case involves investigation, not by Congress but by the Executive Branch, stemming from congressional delegation. When we read the delegation with an eye to First Amendment problems, we hesitate to conclude that Congress told the Executive to ferret out ideological strays in the maritime industry. The words it used—"to safeguard . . . from sabotage or other subversive acts"—refer to actions, not to ideas or beliefs. We would have to stretch those words beyond their normal meaning to give them the meaning the Solicitor General urges. *Rumely* and its allied cases teach just the opposite—that statutory words are to be read narrowly so as to avoid questions concerning the "associational freedom" that *Shelton* v. *Tucker* protected and concerning other rights within the purview of the First Amendment. 390 U.S. at 26-27.

See also *Cole* v. *Young,* 351 U.S. 536 (1955) (Executive Order aimed at "insuring the 'unswerving loyalty' of all [government] employees" held to exceed authority delegated to executive by statute relating to national security).

C. Any military action relating to civilians is subject to judicial review.

While the plaintiffs are not now asking this Court to resolve the merits of the Army's claim of authority to engage in the activities complained of, there can be little doubt that the question is justiciable. Since the Constitution expressly assigns the power to Congress to define the role of the military in domestic affairs,[56] the military is strictly limited to the domestic role defined by statute, and the courts are charged with the duty to review any exercise by the military of that statutory authority. *O'Callahan* v. *Parker,* 395 U.S. 258 (1969); *Toth* v. *Quarles,* 350 U.S. 11

[56] U.S. Constitution, art. I, §8, cl. 14, 15, 16; art. IV, §4.

(1955); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946); *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). While the Army necessarily has some discretion in performing its statutory duties, this Court has long adhered to the principle that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, *are judicial questions.*" *Sterling* v. *Constantin*, 287 U.S. at 401 (emphasis supplied). Furthermore, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers," *Harmon* v. *Brucker*, 355 U.S. 579, 581-82 (1958) (per curiam), particularly when the injured party is a civilian and the source of his injury is the military, cf. *Sterling* v. *Constantin, supra.*

Two factors demonstrate the quality of plaintiffs' claim that the Army is acting beyond the scope of its authority in conducting a nationwide investigation into the political affairs of the plaintiffs and their class. First, this Court has repeatedly held that any grant of statutory power to the military to act in the civilian arena must be narrowly construed.

> It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires. *Raymond* v. *Thomas*, 91 U.S. 712, 716 (1875).

Military performance of a function of government, therefore, even when expressly authorized by statute, cannot be constitutionally justified unless "[t]he necessity [is] actual and present, . . . *such as effectively closes the courts*

and deposes the civil administration." *Ex Parte Milligan*, 71 U.S. at 127 (emphasis supplied).

When the military acts beyond its statutory authority, on the other hand, no showing of necessity can overcome the unconstitutional usurpation. In *Duncan v. Kahanamoku*, 327 U.S., at 324-25, 329 (Murphy, J. concurring), for example,

> [t]he Court's opinion . . . makes clear that the military trials in these cases were unjustified by the martial law provisions of the Hawaiian Organic Act. . . . Indeed, the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation
>
> . . . . The argument [of necessity] thus advanced is . . . a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war.

The government has often argued that the statutory authority of the Army to engage in activities which impinge upon civilian life should be broadly and "reasonably" construed in times of stress to fit military "necessity"[57] but the argument has been consistently rejected by this Court.

---

[57] It should be noted that the scope of the intelligence system challenged by the plaintiffs is far greater even than that required by the government's own definition of "reasonable necessity"—i.e., the necessity of "ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act" (Gov't. Brief, pp. 6, 32; App. 70). While the plaintiffs do not concede the "necessity" as defined by the government, even if they did, the government could not possibly show that it is "necessary" within the terms of its definition to collect and disseminate the kind of information contained in Exhibit A to the Complaint (App. 13-21) and in similar exhibits set forth in the Ervin Hearings at, e.g., Part I, pp. 155, 239-42.

> Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in the light of the 'uniqueness' of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military. We should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition we believe is firmly embodied in the Constitution. *Reid* v. *Covert*, 354 U.S. 1, 40 (1957).

See also *O'Callahan* v. *Parker*, 395 U.S. at 262; *Toth* v. *Quarles*, 350 U.S. at 17; *Sterling* v. *Constantin*, 287 U.S. at 400-01; *Ex Parte Milligan*, 71 U.S. (4 Wall.) at 126; *Ex Parte Merryman*, 17 F. Cas. 144 (No. 9487) (C.C.D.Md. 1861). See generally Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962).[58]

The plaintiffs' ultra vires claim also enhances the justiciability of the issues in this case because Congress, as well as this Court, has repeatedly expressed an extremely narrow view of the scope of permissible military involve-

---

[58] Nor can the talismanic claims of "national defense" be invoked by the government to validate military action which invades constitutional rights, since "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the nation worthwhile." *United States* v. *Robel*, 389 U.S. 258, 264 (1967). See also *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398, 426 (1934) ("Even the war power does not remove constitutional limitations safeguarding essential liberties."); *Ex Parte Milligan*, 71 U.S. (4 Wall.), 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government."); *United States* v. *United States District Court*, 444 F.2d 651, 654 (6th Cir.), *cert. granted*, 39 U.S.L.W. 3556 (June 21, 1971) ("It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of the land.").

ment in civilian affairs. Against a background of violence and civil disorder during the Reconstruction period, for example, the Posse Comitatus Act, 18 U.S.C., section 1385, was passed in 1878 to prohibit the use of military forces by any civilian "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress."[59] This strict Congressional interpretation of the Army's domestic role was underscored by the passage of 18 U.S.C., sections 592 and 593, prompted by the frequent misuse of troops during Reconstruction elections, expressly prohibiting the use of armed forces to supervise the electoral process unless it is "necessary to repel armed enemies of the United States." Nor have contemporary Congresses been less zealous in restricting the domestic activities of the military. Under 18 U.S.C., section 1384, for example, military police are empowered to take necessary measures to control prostitution in the vicinity of military bases, but they are expressly prohibited from making "*investigations*, searches, seizures, or arrests of civilians charged with violations of this section" (emphasis supplied).

---

[59] The legislative history of the statute indicates that it was intended to eliminate the unauthorized use of troops by federal law enforcement officials, a practice that had become so pervasive and scandalous by 1878 that ". . . generals commanding military departments . . . report the employment, hundreds of times, of hundreds of detachments of the . . . Army in the suppression of strikes, . . . execution of the local laws, . . . collection of revenues, . . . [and] arrest of offenders at the request of . . . marshals." Remarks of Representative Ellis, 7 Cong. Rec. 3850 (1878). Representative Knott, one of the other sponsors of the House bill, noted that "[c]ivil law is made for the protection of the people and is paramount to any officer of any grade in the Army, from a corporal up to the Commander in Chief. The subordination of the military to the civil power ought to be sedulously maintained." *Id.*, at 3849.

The courts have not been unmindful of the force of these statutes and their impact on the justiciability of challenges to unauthorized military action not connected with the conduct of a war. Speaking of the Posse Comitatus Act, the district court in *Wrynn* v. *United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961), emphasized that "[i]t is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing 'the inherited antipathy of the American to the use of troops for civil purposes.'" Echoing this concern, the Court of Appeals below held that the plaintiffs' claim of ultra vires military activity is justiciable because "[i]t is highly important for the safety of the country that to the extent consonant with the performance of the military's mission a *separation of sensitive information and military power be maintained, as a separation of match and gunpowder*" (App. 146) (emphasis supplied).

III.

Plaintiffs Have Standing to Adjudicate These Claims —if Indeed the Question of Plaintiffs' Standing Is Properly Before This Court.

A. The issue of plaintiffs' standing was not raised in the courts below.

Throughout this litigation, the government has been shifting its ground continually, but it had never squarely raised the issue of plaintiffs' standing until reaching this Court. In the District Court, Judge Hart dismissed the complaint on the basis of the government's argument that it alleged no unconstitutional conduct on the part of the Army—holding on the merits that there was no claim upon

which relief could be granted because plaintiffs were accusing the Army of conduct in which it had every right to engage (App. 126).

In the Court of Appeals, the government sought to uphold Judge Hart's ruling on the ground that the plaintiffs had failed to present the lower court with a justiciable controversy, in the sense that "justiciability requires that plaintiffs demonstrate that the following are judicially identifiable: a right in the plaintiffs, a duty of the defendants, a breach of that duty, and a remedy within the power of the court." (Brief for Appellees, at 16.) This was the issue decided by the Court of Appeals—and it was decided adversely to the government's contentions.

In its brief in this Court, the government has suddenly shifted its ground again—without benefit of the new ground having been briefed or decided below—and now asserts that plaintiffs' claims lack sufficient focus and concreteness to present the constitutional issue in an adversary context, relying in the main upon dicta in *Flast* v. *Cohen*, 392 U.S. at 95.[60] While it is true that the concept of justiciability is one "of uncertain and shifting contours," *Flast* v. *Cohen, supra* at 97, that does not mean that litigants can shift the contours of their legal argument during various stages of a single proceeding. On the contrary, it is well settled that this Court will not decide issues not

[60] The issue was obliquely mentioned in footnote 20 of the government's brief below, and evoked a brief response from the Court of Appeals in footnote 17 of its opinion (App. 140): "To the extent that the Army's argument against justiciability here includes the claim that appellants' lack standing to bring their action, we cannot agree."

Plaintiffs suggest that these two brief footnote references in the Court of Appeals do not establish that the issue was properly raised below.

properly presented to the courts below. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1971). The question of standing was not even raised by implication in the government's justiciability argument below.

"Justiciability is not a legal concept with a fixed content or susceptible of scientific verification," *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961). Indeed it is a "term of art employed to give expression to a [a] *dual* limitation" placed upon the federal courts by the case and controversy doctrine." *Flast* v. *Cohen, supra,* at 95 (emphasis added). One wing of that doctrine limits the judiciary to considering questions presented in an adversary context and in a form capable of resolution through the judicial process. The other limits the court's intrusion into areas committed to other branches of government. *Id.*

The plaintiffs recognize that "standing" to adjudicate is at times an aspect of justiciability and a corollary to it, but that is only true of that wing of the doctrine having to do with *adversity.* Standing to adjudicate was not part of the justiciability argument pressed by the government in the Court of Appeals. The government's argument below was in fact addressed to that aspect of the doctrine dealing with judicial identification of *a duty and its breach,* and judicial effectuation of a remedy—an argument related to a separation of powers contention which would restrict the judiciary from intruding into the domain of parallel branches of government.

On the other hand, "when *standing* is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and *not* whether the issue itself is *justiciable.*" *Flast, supra,* at 99-100 (emphasis supplied). The government raised only the latter issue in the court

below; accordingly, it ought not to be permitted to inject a new issue at this stage in the litigation.

Nevertheless, the plaintiffs will respond to the government's arguments that they lack standing to sue and demonstrate that the government's position is frivolous even though it is not properly before this Court.

B. Plaintiff individuals and organizations have standing to assert both their claims and the claims of others similarly situated.

The rules concerning standing to sue are designed to test whether a litigant is "a proper and appropriate party to invoke federal judicial power." *Flast* v. *Cohen,* 392 U.S. at 102. In First Amendment cases, these rules require that there be a logical connection between the status of the party who is suing and the issues which he seeks to raise. When a member of the public challenges governmental action on constitutional grounds, therefore, "it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. at 102. Where the claimant's status would be logically affected by the activity or the statute which he is challenging, such as where a taxpayer is challenging the expenditure of public funds, *Flast* v. *Cohen, supra,* or where a group of draft registrants is challenging a draft classification procedure, *NSA* v. *Hershey,* 412 F.2d 1103 (D.C. Cir. 1969), the claimant has a "personal stake in the outcome of the controversy," *Baker* v. *Carr,* 369 U.S. at 204, and he has standing to sue. See also *Jenkins* v. *McKeithen,* 395 U.S. at 417.

1. *There is a logical nexus between the plaintiffs' status and the First Amendment issues they seek to adjudicate.*

It is the plaintiffs' contention, amply supported by recent decisions broadening the principles of standing to raise First Amendment issues in public actions, *Flast* v. *Cohen, supra; Allen* v. *Hickel,* 424 F.2d 944 (D.C. Cir. 1970); *Wolff* v. *Selective Service Local Board No. 16,* 372 F.2d 817 (2d Cir. 1967), that their status as individuals and organizations engaged in peaceful and legal political activity is sufficient by itself to bestow upon them standing to challenge the Army's surveillance of their activity. See Davis, *The Liberalized Law of Standing,* 37 U. Chi. L. Rev. 450, 457 (1970).

Indeed, since the evidence before the District Court indicated that the plaintiffs were not merely general subjects of Army surveillance but were specifically targeted in the intelligence reports (App. 13-21), the existence of a logical nexus between their status and the issues of this lawsuit is unquestionable. Under these circumstances the plaintiffs have standing because they have alleged that the Army is conducting a surveillance program which adversely affects their political activities, just as the plaintiffs in *Allen* v. *Hickel,* 424 F.2d, at 947, had alleged "that the defendants [were] proposing to devote Government park property to uses inconsistent with the Free Exercise and Establishment Clauses [the erection of a creche]," and the plaintiff in *Flast* v. *Cohen,* 392 U.S. at 85, had complained "that federal funds . . . were being used to finance instruction in . . . religious schools." [61]

[61] In *Flast,* where the plaintiffs could show no special injury and were limited to suing in their status as taxpayers, the Court divided the nexus test in two parts. First, it was necessary to establish the logical link between the litigant's status and the type of govern-

The political activities engaged in by the plaintiffs which define their status and the issues they are seeking to adjudicate, are indisputably protected by the First Amendment.[62] See, e.g., *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). The right to speak and organize in order to advance political views is the bedrock of our Constitution. "Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty." *Bates* v. *City of Little Rock*, 361 U.S. 516, 522-23 (1960). Moreover,

> "[our] form of government is built on the premise that every citizen shall have the right to engage in political expression and association. . . . History has amply proved the virtue of political activity by minority, dissident groups. . . ." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-251 (1957).

2. Plaintiffs allege injury in fact and are within the zone of interest protected by the constitutional guarantees they seek to enforce.

Even under the stricter rules of standing that apply to constitutional cases arising *outside* the First Amendment

---

ment action attacked; and, second, it was necessary to establish the nexus between the plaintiff's status and the precise nature of the constitutional infringement alleged. *Id.* at 102. Even if the plaintiffs in this case were required to establish both links, they could easily do so. Their status as political activists is closely linked both to the Army's program of political surveillance and to the First Amendment rights it is claimed to infringe.

[62] Having filed no answer and having moved to dismiss, the government does not put in issue any of the allegations in the complaint and thus does not contest that the plaintiffs are engaged in pure First Amendment activities. See *supra*, n. 11.

area, the plaintiffs would nevertheless have standing to sue because they have alleged "that the challenged action has caused [them] injury in fact, economic or otherwise," and the interest they seek to protect is "arguably within the zone of interest to be protected . . . by the . . . constitutional guarantee in question." *Association of Data Processing Service Organization Inc.* v. *Camp*, 397 U.S., at 152-53.[63] Accord, *Barlow* v. *Collins*, 397 U.S. 159 (1970). Although this Court has held that it is not necessary to apply this stricter standard to First Amendment cases, the plaintiffs can demonstrate the quality of their standing and the frivolousness of the government's argument by showing that they meet the requirements laid down in *Data Processing* as well as those in *Flast*.

A chilling effect which amounts to a justiciable injury confers "standing to challenge the source of the chill on any person who plausibly alleges that he is chilled." *NSA* v. *Hershey, supra*, at 1119. See also *Lamont* v. *Postmaster General, supra; Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota, supra; Baggett* v. *Bullitt, supra; Talley* v. *California, supra*. The plaintiffs have "plausibly alleged" that their status as civilians attempting to engage in protected First Amendment activity gives them standing to complain that their First Amendment interests are in fact damaged by the inclusion of their names and political pro-

[63] "Injury in fact," of course, does not require a showing of financial or economic loss. "A person or a family may have a spiritual stake in First Amendment values sufficient to give him standing." *Association of Data Processing Service Org., Inc.* v. *Camp*, 397 U.S. at 154. Indeed, in *Allen* v. *Hickel*, 424 F.2d at 946, the plaintiff taxpayers had standing to complain about the construction of a creche even though "no Government funds [were] expended in the construction, maintenance, disassembly, or storage of the creche."

files in Army intelligence reports. Judge Wilkey's opinion below attests to the plausibility of their complaint:

> [T]he appellants are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all . . . have been the subject of Army surveillance reports. . . . Since this is precisely the injury of which appellants complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine. . . . (App. 140 n. 17).

The question of standing was treated in the same manner by Judge Friendly in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117 (S.D. N.Y. 1969) (three-judge court), *affirmed*, 401 U.S. 154 (1971). In *Wadmond*, the plaintiff law students brought suit challenging the constitutional validity of procedures for admission to the New York bar. The rule under attack required a candidate for the bar to furnish satisfactory proof to a character and fitness committee "that he believes in the form of government of the United States and is loyal to such government . . . ." Plaintiffs claimed that the rule violated their First Amendment rights because it had an impermissible chilling effect on persons contemplating admission to the bar, "notably law students, since they will fear lest becoming members in controversial organizations or engaging in protests will be taken to evidence lack of belief in the form of government of the United States or disloyalty to it." 299 F. Supp. at 126. The three judge court held that the plaintiffs had standing to challenge the procedures in question because they alleged injury in fact in the form of an inhibiting effect on the free exercise of their First Amendment freedoms. The court

went on to note that plaintiffs had "set themselves apart from the public at large sufficiently to have standing . . . ." *Id.* at 122.

In the instant case, plaintiff individuals have set themselves apart from the public at large and claim, in addition to the allegations of injury to their expressional rights, injury in fact to their First Amendment associational rights. They have been actively engaged in various political movements but now claim that the government's intelligence scheme deters them from fully exercising their right to associate with others for common lawful political aims. Specifically, they allege that their associational rights are abridged because the implementation of the Army's policy has inhibited others interested in their political cause from associating with them (App. 10-11).

The government, however, persists in characterizing the plaintiffs as persons whose willingness to come forward to challenge the Army belies their allegation that they are in fact injured.[64] This is an extraordinary perversion of the chilling effect doctrine, one of the main functions of which is to permit a claimant to vindicate the First Amendment rights of those who are not parties before the court precisely because they *are* inhibited by the challenged prac

[64] The government claims support for this proposition in a remark, taken out of context, during oral argument by plaintiffs' counsel that plaintiffs "are not people obviously who are cowed and chilled" (Gov't. Brief, p. 36). In context, the remark indicated that the plaintiffs were not deterred, as others were, from instituting this lawsuit. (Transcript of Proceedings, United States District Court for the District of Columbia, April 22, 1970, at 17.) As the court below indicated, moreover, "the fact that these particular persons are sufficiently uninhibited to bring this suit [should not be] any ground for objecting to their standing. See *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958); *Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678, 684 (1970)" (App. 140).

nce. This was clearly pointed out by the Court in *NAACP* v. *Alabama,* 357 U.S. at 459:

> To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. . . . The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. See Barrows v. Jackson, 346 U.S. 249, 255-259, 97 L.Ed. 1586, 1594-1597, 73 S.Ct. 1031; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 183-187, 95 L.Ed. 817, 859-862, 71 S.Ct. 624 (concurring opinion).

See also *Dombrowski* v. *Pfister, supra,* at 486; *DuBois Club* v. *Clark,* 389 U.S. 309, 314-15, 318 (1967) (Douglas, J., dissenting); *NAACP* v. *Button, supra,* at 432; *Straut* v. *Calissi,* 293 F. Supp. 1339, 1342, n. 8 (D.N.J. 1968); *Anderson* v. *Sills,* 106 N.J. Super. 545, 554 (Ch. Div. 1969), *rev'd on other gds,* 56 N.J. 210 (1970). See generally, Comment, *The First Amendment Overbreadth Doctrine,* 84 HARV. L. REV. 844, 854-56 (1970).

To accept the government's argument would be to foreclose the right of *any* person to bring a suit in which he alleges the inhibition of a full exercise of his First Amendment rights. Indeed, this Court has observed that "[t]o require that [the right] be claimed by the members [of an organization, who prefer to remain anonymous] would result in nullification of the right at the very moment of its assertion." *NAACP* v. *Alabama,* 357 U.S., at 459. See also *NAACP* v. *Button, supra; Bates* v. *City of Little Rock, supra.* Under these circumstances the courts have long

understood that "there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters." *Anderson* v. *Sills*, 56 N.J. 210, 221, 265 A.2d 678 (1970). Cf. *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Straut* v. *Calissi, supra.* See generally Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970).

The plaintiffs' standing, therefore, must be assessed in light of their challenge to a governmental practice which has "an inhibiting effect [on] the flow of democratic expression and controversy upon those directly affected and those touched more subtly." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 248 (1957). See also *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940). Indeed, one aspect of the plaintiffs' injury which illustrates the quality of their standing is that "those touched more subtly" by Army surveillance are deterred from associating with the plaintiffs. By singling them out for surveillance the Army has driven a wedge between plaintiffs and others "who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate." *Watkins* v. *United States*, 254 U.S. 178, 197-98 (1957). This Court is well aware that the effect of such targeting, when it becomes publicly known, can result in public harassment of unpopular groups or individuals, and, in some instances, imposition of a stamp of disloyalty. *Sweezy* v. *New Hampshire*, 354 U.S. at 248. See also *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Bates* v. *City of Little Rock, supra; NAACP* v. *Alabama, supra.*

The most obvious example of those "touched more subtly" by Army surveillance, of course, are the rank and file members of the plaintiff organizations, whose rights

they have standing to vindicate. *NAACP* v. *Alabama, supra; Joint Anti-Fascist Refugee Committee* v. *McGrath, supra.* Even though the names of the members may not be memorialized in Army files and dossiers, their freedom of association is chilled when they are inhibited by the Army's activity from renewing their organizational ties, or when others are dissuaded from joining them. *Bates* v. *City of Little Rock, supra,* at 524. Cf. *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293 (1961). The evidence on remand will show that Army surveillance had such an effect on the plaintiff organizations and their present and prospective members.[45]

Nor can there be any question that the interests plaintiffs seek to vindicate are "arguably within the zone of interests" protected by the First Amendment. Plaintiffs seek to vindicate rights of speech, association and assembly, rights at the core of the Amendment. Cf. *Investment Company* v. *Camp,* 400 U.S. 45 (1971).

Finally, the plaintiffs' standing is enhanced by the very nature of the governmental activity they are challenging. "[S]tanding to challenge official action is more apt to exist when that action is not within the scope of official authority. . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 156 (Frankfurter, J., concurring). See also *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94 (1902). Cf. *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968). In this case the plaintiffs specifically allege that the military surveillance program exceeds the lawful needs and authority of the United States Army. . . ." (App. 11)—that is, that the program as it has been con-

[45] See n. 34, *supra.*

ducted is unsupported by any statute or the Constitution, and is, therefore, illegal at its roots.

This is extremely significant, since the "source of a chilling effect" is one of the chief considerations in determining whether those who have been touched by it have standing to challenge it in court, *Davis v. Ichord*, 442 F.2d 1207, 1214 (D.C. Cir. 1970); cf. *NSA* v. *Hershey*, 412 F.2d 1103 (D.C. Cir. 1969); *Wolff v. Selective Service Board*, 372 F.2d 817 (2d Cir. 1967). When that source is a governmental activity which is itself "unauthorized and contrary to law," *NSA* v. *Hershey, supra*, at 1123, the standing of a party who has "plausibly alleged" injury is beyond question.

Plaintiffs, of course, also have standing to challenge the invasions of their own privacy separate and apart from their standing to challenge the other unlawful aspects of the government's activity.

IV.

This Case Cannot Be Mooted by the Army's Assertion That Its Domestic Surveillance Activity Has Been Reduced.

There are hints in the government's brief, although no outright claim, that this case is mooted because of actions taken by the defendants subsequent to the filing of the complaint in the District Court. (See Gov't. Brief at 9-10, 34.) Specifically, the government suggests that the March 6, 1970 Department of the Army Memorandum for the Chief of Staff (*Id.*, p. 53) and the Department of the Army order of June 9, 1970 (*Id.*, p. 45) have effectively eliminated any need for granting the plaintiffs relief.

If the government does take the position that the case is moot because its entire intelligence gathering apparatus has been dismantled, that is a question properly decided only by the trial court upon evidence. In fact, plaintiffs could show at trial that a substantial portion of the apparatus, and the information which it has collected, is still in existence.

Even the self-serving statements of Department of Defense personnel (as distinguished from the unsubstantiated assertions of the government's brief writers) do not support the claim that the system has been dismantled. In testimony before the Senate Subcommittee on Constitutional Rights, for example, Assistant Secretary of Defense (now Secretary of the Army) Robert F. Froehlke admitted on March 2, 1971 that the Army had not developed an effective mechanism for implementing its new restrictive policy on surveillance—highly touted in the government's brief as the "June 1970 Collection Plan." (Gov't Brief, at 9-10, App. B.) The following colloquy between Secretary Froehlke and Senator Kennedy is significant:

> Senator Kennedy: And you are not maintaining any information then on any individuals at the present time who are involved in any civilian disturbances or have been involved in any protests?
>
> Mr. Froehlke: Only under the policy that we now have. It does allow it under certain circumstances, but in all cases a civilian official would first have to give his approval.
>
> Senator Kennedy: At what level of government?
>
> Mr. Froehlke: A Presidential appointee.
>
> Senator Kennedy: And what criteria does he use?
>
> Mr. Froehlke: Judgment, his judgment.

Senator Kennedy: Completely a subjective determination?

Mr. Froehlke: As of this moment, yes. A new council has been formed. I am Chairman of the Council. This is one of the things to which we will have to address ourselves, do we want to set criteria?

Senator Kennedy: What kind of criteria?

Mr. Froehlke: I am really not prepared to answer that question. I am not hedging. I have not thought the particular problem out. (Ervin Hearings, vol. I, p. 435).[66]

Judge Wilkey was correct, therefore, in writing for the majority below, that the Department of the Army's new directives did not dispose of the matter, and that the District Court should

> . . . hear evidence; ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights. [App. 146-47]

Whether or not the directives of the Department of the Army satisfy plaintiffs' complaint is a matter of dispute. This dispute can only be settled by an examination of evidence relating to Army surveillance after the directives were promulgated. Since this determination will require a

---

[66] In his prepared statement of the Defense Department's position, Secretary Froehlke had earlier remarked to the Subcommittee that

> [o]n March 20th [1970], the Army took action to have all copies of civil disturbance publications Volume I: Cities and Organizations of Interest, and Volume 2: Personalities of Interest, known as the Compendium, destroyed. A certificate of destruction was requested. *The destruction of all copies has not yet been assured.* (Ervin Hearings, Part I, p. 394.)

hearing and presentation of evidence by both sides, it can only be made by the District Court, in accordance with Judge Wilkey's opinion.[67]

Furthermore, where, as here, the only issue before the Court is justiciability, and there is thus no chance of this Court rendering a far-reaching decision on the merits of an important constitutional issue, the judicial concerns about deciding constitutional issues in the context of a moot claim are absent, and the Court may follow without hesitation the normal procedure of leaving factual issues for the determination of the trial court on remand.

---

[67] Moreover, even if it could be determined that the Secretary's directives rectified the situation complained of by the plaintiffs, there is still a controversy as to whether or not the Army is free to revert to this activity in the future. The case law establishes a Court policy of not permitting defendants to escape an adverse injunction by temporarily refraining from the complained of activity.

That policy was forcefully articulated by this Court in *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944):

> Despite the respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. *Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.* (Emphasis added.)

See also *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968); *Division 1287 of Street Elec. Ry. & Motor Coach Employees of America* v. *Missouri*, 374 U.S. 74, 77-78 (1963); *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515 (1911) ("[c]onsideration ought not to be . . . defeated by short term orders, capable of repetition yet evading review").

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals remanding this case to the District Court for trial should be affirmed.

Respectfully submitted,

FRANK ASKIN
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Respondents

February 28, 1972

Counsel gratefully acknowledge the assistance of Jerrold Becker, Esq., and the following student members of the Constitutional Litigation Clinic of Rutgers Law School, Newark, New Jersey, in the preparation of this brief: Tamar Benamy, Jeffrey Berger, Norman Buntaine, David Klasfeld, Rubie Mages, Mark Manewitz, Steven Riskin, Dennis Strain.

APPENDIX

Chilling Effect: A View From the Social Sciences*

A. *Introduction to the Social Science Data*

The sociological, political, and psychological processes which result in a chilling effect on political action are

---

*Plaintiffs' Counsel gratefully acknowledge the assistance of the following persons in the preparation of this appendix:

Michael Baker,
doctoral candidate, Department of Sociology, Columbia University; and Assistant Director, Project on Computer Data Banks;

Dr. Sally Hillsman Baker,
Assistant Professor of Sociology, City University of New York, Queens College;

Astrida Butners,
doctoral candidate, Department of Sociology, Columbia University; and Research Associate, Center for Policy Research;

Dr. Robert Engler,
Professor of Political Science, Graduate Division, City University of New York;

Dr. William Goode,
Professor of Sociology, Columbia University; and President, American Sociological Association;

Dr. Leonard Krasner,
Professor of Psychology, State University of New York at Stony Brook;

Robert Laufer,
Lecturer in Sociology, State University of New York at Albany;

Dr. Hannah Levin,
Professor of Psychology, Livingston College, Rutgers University.

Dr. Milton Mankoff,
Assistant Professor of Sociology, City University of New York, Queens College;

Dr. Harold Proshansky,
Dean of the Graduate Division, City University of New York;

(footnote continued on following page)

receiving renewed attention in the social sciences. The reappearance of chill as a social issue is one good indicator that certain repressive social forces which have been present intermittently throughout the long history of this nation threaten once again to rise into dominance. An atmosphere of public fear prevailed during the witch hunts of Salem, the repressions of the Alien and Sedition Acts, the silencing of critics of slavery through the firing of teachers and ministers in the pre-Civil War South, the Red scare of post-World War I, the early and more recent tactics against union organizing activity, the anti-Japanese measures during World War II, and the anti-Communist fervor of the McCarthy era.[1]

Dr. H. H. Wilson,
Professor of Politics, Princeton University;

Dr. P. G. Zimbardo,
Professor of Psychology, Stanford University;

Sandra Abramson,
graduate student, City University of New York; and,

Norman Buntaine,
law school student member of the Constitutional Litigation Clinic, Rutgers School of Law at Newark.

[1] For some pertinent sources from a very extensive literature, see: Zechariah Chafee, Jr., *Free Speech in the United States;* Marion L. Starkey, *The Devil in Massachusetts;* John C. Miller, *Crisis in Freedom: the Alien and Sedition Acts;* James M. Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties;* Russell B. Nye, *Fettered Freedom;* Clement Eaton, *Freedom of Thought in the Old South;* Robert K. Murray, *Red Scare: A Study of National Hysteria, 1919-1920;* Morton Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation;* Eleanor Bontecou, *The Federal Loyalty-Security Program;* John Lord O'Brian, *National Security and Individual Freedom;* Fred J. Cook, *The Nightmare Decade;* Walter Gellhorn, *Security, Loyalty and Science;* John Henry Faulk, *Fear on Trial;* Dalton Trumbo, *Additional Dialogue;* and John Cogley, *Report on Blacklisting.*

Democratic politics is predicated on the belief that people can reason, grow and change. Anxious men are rarely free men. Those tormented by the thought that it may have been an exercise of freedom that cost them their jobs, deferments, civil rights or liberties—but who never know for sure—are not likely to develop the strengths political democracy needs. Surveillance serves to chill thought and to discourage the risks of freedom.

By chilling effect we refer to any diminution in or inhibition of the expression of legitimate political behavior in response to governmental practices. It is, in the instant case, the diminution and inhibition of political behavior as a result of military surveillance of legitimate political activity.

By surveillance we do not mean limited record-keeping of the conventional type necessary for the functioning of a specific organization or institution. Surveillance in *Webster's Dictionary* is defined as "a watch kept over a person, especially a suspect." In common usage, surveillance implies that some actor or entity (in the instant suit, the military) subjects to scrutiny another actor or entity because the probability exists that the person surveilled is doing something contrary to established practice. Criminal suspects are kept under surveillance, while industrial workers, for example, are only supervised. Supervision involves also the notion of keeping watch over a performance, but does not intimate that the performance is illegitimate in some way. Similarly, newspaper investigations involve only reportorial functions, and carry no such negative connotations.

By legitimate political behavior we mean behavior which does not deviate from accepted legal norms. These norms or standards of action are the result of past experiences

and historical solutions to the problems of democratic participation.[2] Surveillance implies in the public's mind that a judgment has been made by a governmental unit that the behavior surveilled is not within the range of legitimate political behavior.

The application of surveillance stigmatizes, i.e. it labels as deviant and illegitimate the behavior of those involved in protected political expression. The deviant label has grave consequences for the individual so designated.[3] Chill occurs as a result of this stigmatization.

The charge that protected behavior is chilled by military surveillance is supported by a great deal of data extracted from psychological investigations. The occurrence of chill is a recognized and normal response to threatening social situations, which people have learned to categorize as threatening because of their own or other people's past experiences in similar situations. This is a case of social learning called avoidance behavior which is acquired directly or vicariously.[4] Among the several factors which facilitate the response of chill to surveillance are, in the terms used by psychologists: the power or authority of the surveillance agent; evaluation apprehension (the

---

[2] See generally, Harry Eckstein, *Division and Cohesion in Democracy* (Princeton: Princeton University Press, 1966); Lucian Pye and Sidney Verba, eds., *Political Culture and Political Development* (Princeton: Princeton University Press, 1965); Alexis de Tocqueville, *Democracy in America*, ed. by J. P. Mayer (Garden City, New York: Doubleday and Company, Inc., 1969); and A. D. Lindsay, *The Modern Democratic State* (New York: Oxford University Press, 1947).

[3] Edwin M. Schur, *Labeling Deviant Behavior: Its Sociological Implications* (New York: Harper and Row, 1971), 7-36. See also Erving Goffman, *Stigma: The Management of Spoiled Identity* (Englewood Cliffs, N. J.: Prentice Hall, 1963).

[4] A. Bandura, *Principles of Behavior Modification* (New York: Holt, Rinehart and Winston, 1969).

anxiety which occurs to someone whose behavior is being judged); the probabilistic nature of perception; the uncertainty and ambiguity of the surveillance situation; and the phenomonological experience of the person being surveilled, as to his anonymity or deindividuation.

These psychological principles which describe human behavior are tied together by the nature of the human perceptive process itself: people must first define a situation before they respond to it. This definition is reached by individuals as they unite all the discrete elements of the situation into their respective meaningful categories. Individuals categorize different objects, events, and people into classes and proceed to respond to them as a function of their classification rather than as a function of their uniqueness.[5]

In categorizing apparently different stimuli (e.g. political meetings, knowledge of surveillance by the military, and sanctions in the past which have stemmed from these situations) into the same class—"a threatening situation"—individuals have chosen certain aspects of the situation which are critical or relevant, and have discarded others which are irrelevant. This class is named ("a threatening situation") and then provides direction for the individual's activities so that he knows in advance what are the appropriate and inappropriate actions for him to take.[6] Surveillance is one class of events under which the individual categorizes particular events as potentially threatening and then functions appropriately in terms of his own well-being, to avoid or minimize the perceived possible negative consequences.

---

[5] J. S. Bruner, J. J. Goodnow, and G. A. Austin, *A Study of Thinking* (New York: Wiley, 1956).

[6] *Ibid.*

B. *Chill: Theoretical and Empirical Bases*

The very act of the government's surveillance of an individual or group engaged in dissent tends to define the activities of the individual or group as being in some sense illegitimate. Surveillance, in American society, is traditionally reserved for those individuals and groups which in some way are presumed to be engaged in illegitimate activities. This traditional American use of surveillance is in contrast to its use in totalitarian societies, where surveillance is an intrinsic control device used by the government power elite to maintain the governmental structure.[7]

Critical literature about Eastern Europe, the U.S.S.R. and Nazi Germany demonstrates the caution, passivity and terror of citizens who have been taught that dissent is dangerous. In these foreign non-democratic political systems, comments, telephone calls, mail, writings, associations and actions are watched. There are consequences for "wrong" sentiment and behavior. Citizens learn by grim example to police themselves rather than to test the system and thereby invoke punishment for being "unreliable."

The general popular assumption is that surveillance means control, concurrence and the ultimate "retooling" of thought. As Hannah Arendt has written,

> In a system of ubiquitous spying, where everybody may be a police agent and each individual feels himself under constant surveillance; under circumstances

[7] Carl J. Friedrich and Zbigniew K. Brzezinski, *Totalitarian Dictatorship and Autocracy* (Cambridge, Mass.: Harvard University Press, 2d ed., 1965). Also see William Kornhauser, *The Politics of Mass Society* (Glencoe, Ill.: Free Press, 1959); Andrei D. Sakharov, *Progress, Coexistence and Intellectual Freedom* (New York: Norton, 1968); and Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, 1951).

> moreover, where careers are extremely insecure and where the most spectacular ascents and falls have become everyday occurrences, every word becomes equivocal and subject to retrospective interpretation.[8]

Similarly, in the United States, a public which is aware of the existence of a governmental surveillance program will consciously or unconsciously limit or alter the scope of expression of its political beliefs, both in the present and the future. Surveillance by the government of a particular group can have a real and measurable effect on that group, as well as repercussions on the quality of political expression throughout all of society.

There are, in general, two processes which result in chill. In the first, an individual knows about (or perceives that such is the case without direct knowledge) surveillance and the accompanying record-keeping activities which are directed at groups engaged in legitimate political activity. As a result he, along with others, redefines the *legitimate* political activities as *illegitimate* and is therefore reluctant to act on his political beliefs. He has been "prevented" from taking part himself and in turn becomes intolerant of the activity. He is now himself part of the mechanism of this redefinition.

In the second process, the individual knows about (or perceives) surveillance and record-keeping directed against legitimate political groups. He also knows that records are sometimes misused. As a result he modifies his form of political expression because he is afraid of the consequences of a record of his presence being kept and later misused or misinterpreted. Both processes can occur simultaneously.

---

[8] Arendt, *op. cit.*, 431.

Psychological literature recognizes four categories of responses which, in the surveillance situation, cause chill:

1) individuals perceive and categorize surveillance situations as threatening, on the basis of their needs, past experiences, and expectations;

2) individuals respond to surveillance situations in such a way as they conceive appropriate to this categorization;

3) individuals learn to avoid threatening situations based on the principles of discrimination, avoidance, generalization, vicarious learning, and aversive conditioning; and lastly,

4) the social psychological factors of power and authority, evaluation apprehension, uncertainty and ambiguity, and anonymity and deindividuation influence how the individual perceives, categorizes, and responds to the stimuli.

Herbert Hyman has asked the following question[9] in his research: what difference between the phenomena experienced by citizens in England and America respectively, in their political environments, could account for the more widespread intolerance of political deviation on the part of Americans in the 1950s, than was the experience in England during the same time? He concluded that the contributing factor was that Americans experienced a far greater amount of official investigative activity (such as

---

[9] Herbert H. Hyman, "England and America: Climates of Tolerance and Intolerance" (1962) in Daniel Bell, ed., *The Radical Right* (Garden City, New York: Doubleday and Company, Inc., 1963), esp. 298. Hyman is Professor of Sociology at Wesleyan University in Middletown, Connecticut.

security checks and publicly visible surveillance of non-conformists) than did the English. Such activity in the United States led to a widespread activation of intolerant attitudes on the part of citizens. This led to citizen oppression of other citizens who were labeled as non-conformists. Also, the surveillance practices had created an atmosphere of fear among the sub-groups which had been so labeled by the investigative activities.

Another classic exploratory study[10] of the psychological effects of surveillance attempted to evaluate the impact of governmental loyalty and security inquiries. Marie Jahoda and S.W. Cook questioned in depth 70 professionals in federal positions and 15 faculty members in universities, all in the Washington, D.C. area. The investigators felt that the impact of security measures depended upon how people perceived the measures as well as on the actual measures that were taken. In fact, their underlying proposition was that the "social psychological consequences of a social policy can, but need not, coincide with the purposes for which the policy was designed." [11]

Jahoda and Cook found that people responded to the entire situation as defined by the prevalent atmosphere or climate of thought, rather than perceiving and responding only to the specific official and unofficial security measures which were taken. In responding to the global situation, people began to adhere or to fear that they must adhere to more specific and concrete codes of behavior than they had traditionally observed. After this occurred, people often internalized the newly accepted standard or code. They per-

---

[10] Marie Jahoda and S. W. Cook, "Security Measures and Freedom of Thought," 61 *Yale Law Journal* 296-333 (1952).

[11] *Ibid.*, 298.

ceived it as one to which they voluntarily complied rather than as one which was forced upon them as a consequence of the pervasiveness of a climate of thought. Examples of the behaviors which changed as a result of the foregoing process were: 1) severing of membership in organizations on the Attorney General's list and cancelling of subscriptions to literature sent by these organizations; 2) refusing to sign petitions without proof of a bona fide sponsorship; 3) refraining from joining an organization *not* on the Attorney General's list for fear it might turn out to be a communist front or might perhaps later develop in a radical direction; and 4) being cautious in political conversations with strangers.

The authors stressed that respondents were often unable to distinguish between "founded" and "unfounded" fears and allegations because of the climate of thought which prevailed. This resulted in the stigmatization of anyone who was investigated, either officially or unofficially. The penalties which the respondents felt were incurred by those being investigated included personal agony, damage to physical health, legal expenses, mental agony, and loss of reputation. Respondents also perceived that a subsequent clearance of any charges made by the government did not provide relief, because 1) fears continued to exist that an investigative file would be reopened; 2) suspicions of others were not erased by a mere clearance of the charges (in fact, files *were* reopened based on this continuing suspicion); and 3) those under scrutiny were judged on the basis of the past, not the present, and therefore knew that their present activity might well come under scrutiny in the future. People know that the climate of the times will

change many times within the span of one life. The investigators concluded that:

> [T]he hazards of *being investigated*—even if one is subsequently cleared—are so great that individuals are induced to limit their behavior by avoiding (or trying to avoid) anything that might conceivably arouse anyone's suspicion and thus lead to charges and an investigation.[12]

It must be stressed, as did Jahoda and Cook, that an individual does not respond to a specific administrative measure or event but instead perceives that specific event as an integral part of related activities, a class of events, and thus responds to these interrelated measures. The specific events of government security measures taken in the 1950s were categorized by individuals as psychologically salient elements of the category "surveillance," particularly with respect to people's perceptions of the government measures. From the responses reported, we have an indication of the type of responses an individual makes under conditions of surveillance. These responses determine the individual's perception of what actions may be appropriate or inappropriate in *other* situations. By being aware of the operation of a system which is categorized as surveillance, and in responding to the total situation or climate of thought, respondents in the study (as is evidenced by their own limiting of activities) were in fact chilled.

The experiences which people have with the political process are key factors which determine the psychological preconditions needed for a democratic or participative political system. Since the key to political democracy is not that citizens be always active (i.e. acting politically) but

[12] *Ibid.*, 318.

that they be "potentially active,"[13] the public's reactions to various political experiences, such as surveillance, are of the utmost importance. The potentially active public is deterred from participating because the surveillance of the politically active public effectively neutralizes the participative incentive which might have appealed to the potential actor. The dynamic of potential activity is in this way eliminated, and the psychological precondition needed for a participative political system is absent.

An individual's political behavior, as well as his social behavior, contains an historical dimension. For example, as the result of past political experiences in which dissenting political activity was severely sanctioned, German and Italian adults today feel greatly limited in their freedom of political communication. The empirical finding[14] is that they feel more restricted than do Americans and British in discussing political and governmental affairs. The habits and feelings developed during these earlier periods have persisted into the present, "despite the formal freedoms of the contemporary German and Italian political systems."[15]

Evidence that governmental policies or practices affect the scope of political expression should be taken very seriously, since these findings from Germany and Italy strongly

---

[13] Gabriel A. Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton: Princeton University Press, 1963), 481.

[14] *Ibid.*

[15] *Ibid.*, 119. Also see Dennis W. Brogan, *Citizenship Today: England, France, the United States* (Chapel Hill, N. C.: The University of North Carolina Press, 1960); and Lester Milbraith *Political Participation: How and Why Do People Get Involved in Politics* (Chicago: Rand-McNally, 1965).

suggest that negative sanctions, when applied to political activity, have a chilling effect not only on current levels of expression and participation but also have long-term inhibiting effects that may last from 20 to 30 years or more.

There is evidence that intelligence gathering units are acutely aware of their ability to stigmatize a group and inhibit their political expression by engaging in surveillance.[16] Because surveillance is practiced secretly and the information it produces is kept secret, no citizen involved in political dissent can ever be certain that he is or is not under scrutiny—once he becomes aware that some people in his situation are. This condition of uncertainty gives rise to anxiety and to the suppression of his normal political responses.[17]

Just as important, if not more so, those who are not already involved in political activity are more likely to be reluctant to participate politically. The sociological literature in deviant behavior amply documents the extent to which individuals avoid assuming stigmatized roles.[18] A

---

[16] For one example only, see Robert Wall, "Special Agent for the FBI," *New York Review of Books*, vol. 12, no. 1, pp. 12-18. Generally, see *Privacy and the Rights of Federal Employees*, Subcommittee on Manpower and Civil Service of the Committee on Post Office and Civil Service, House of Representatives, 90th Congress, 2d session, June 1968. See also the FBI Media, Pennsylvania document which encourages agents to make their presence known to members of the New Left in order to generate paranoia among them by fostering the belief that "there is an FBI agent behind every mail box," in Frank Donner, "The Theory and Practice of American Political Intelligence," *New York Review of Books*, April 22, 1971, p. 27. This last quotation on paranoia has been very widely publicized; see for example, "FBI Files Tell of Surveillance of Students, Blacks, War Foes," *New York Times*, March 25, 1971, pp. 1 and 33.

[17] Bandura, *op. cit.*

[18] Marshall Clinard, *Sociology of Deviant Behavior* (New York: Holt, Rinehart and Winston, 1968), 1-48. Also see Schur, *op. cit.*

frightening aspect of this situation is that individuals or groups who are only curious bystanders can also be stigmatized,[19] by being indiscriminately included in the lists of those present at the activity surveilled.

The phenomenon of chill is well described in the psychological literature as a special case of learning, called avoidance learning or aversive conditioning.[20] As a result of undergoing either direct or vicarious experiences, an individual's behavior comes to be regulated by stimuli that were present in the situation that preceded the responses. A very simple example of this principle of conditioning or learning is where a person stops when seeing a red light, because of having seen what can happen if he does not stop (negative reinforcement), and likewise learns to proceed when seeing a green light. The red light tells him to avoid crossing the street when the stimulus is present. In the surveillance situation at a peaceful demonstration, the actor's observation or belief that a military agent is present, watching his behavior, perhaps photographing and taking notes, is a stimulus to avoid the situation. He has learned either directly or vicariously (through the numerous media sources) that this surveillance has been and is taking place, and can lead to further investigation, permanent police records, and other negative consequences which would endanger his reputation, friendships, and livelihood.

The surveillance agent need not be recognized or obvious. Bandura[21] discusses how symbols, words, or knowledge can act as a stimulus and control behavior just as ef-

---

[19] Goffman, *op. cit.*

[20] Bandura, *op. cit.*

[21] *Ibid.*

fectively as the external stimulus of a red light. Plaintiffs know that surveillance of political dissent meetings is being conducted, and their responses are controlled by this knowledge just as effectively as if there were men on guard in military uniform at the door.

Another principle of learning important to the surveillance situation and described by Bandura is the generalization of learning. This principle, demonstrated in many psychological experiments,[22] explains how a situation that one learns to avoid need not be identical to a prior situation where one has witnessed aversive consequences to himself or to someone else. Bandura concluded from these findings that where negative sanctions are applied to a wide range of social responses in diverse settings, one finds a large number of behaviors inhibited.[23] The surveillance case described in this lawsuit is such a situation.

Avoidance of a perceived dangerous situation can maintain effective control over behavior for a long period of time. This inhibitory control seems to be effective because the person who avoids a threatening situation feels relieved as a result of having avoided it. This feeling is reinforcing and strengthens the person's tendency to avoid future similar situations.[24]

---

[22] See U. Desiderato, "The Relation of Repetitions in the Speech of Young Children to Certain Measures of Language Maturity and Situational Factors: Part I," 4 *Journal of Speech Disorders* 303-318 (1964); H. S. Hoffman and M. Flishler, "Stimulus Factors in Aversive Controls: the Generalization of Conditioned Suppression," 4 *Journal of Experimental Analysis of Behavior* 371-378 (1961); and W. H. Honig and R. M. Slivka, "Stimulus Generalization of the Effects of Punishment," 7 *Journal of Experimental Analysis of Behavior* 21-25 (1964).

[23] Bandura, *op. cit.*

[24] A. Bandura, "Influences of Models' Reinforcement and Contingencies on the Acquisition of Imitative Responses," 1 *Journal of Personality and Social Psychology* 589-595 (1965).

Other studies by Kanfer[25] on verbal behavior (speech) show that human subjects learn to inhibit speech by observing the negative consequences to others of specific speech behavior. People learn to internalize the information they gain from observing others, and are guided in subsequent situations by the anticipations of rewards and punishments. Also, people do not have to be aware of surveillance, or of their changed responses (such as inhibition of speech behavior), for a chill to have occurred. Krasner describes how people can change or decrease their verbal behavior without being aware of this change.[26]

Jerome Bruner has shown[27] that past experiences, needs, and expectations influence perception. In addition to perceiving situations in a particular way as a result of these influences, individuals confronted with stimuli which require a response will interpret the stimuli so as to make the appropriate response.[28] In ambiguous or complex situations individuals will attempt to structure the relevant situation or event in such a way that it is understandable.[29]

---

[25] F. H. Kanfer, "Vicarious Human Reinforcement: a Glimpse Into the Black Box," in L. Krasner and L. P. Ullmann, eds., *Research in Behavior Modification* (New York: Rinehart and Winston, 1964), 244-267.

[26] L. Krasner, "Verbal Operant Conditioning and Awareness," in K. Salzinger and S. Salzinger, eds., *Research in Verbal Behavior and Some Neurophysiological Implications* (New York: Academic Press, 1967).

[27] Jerome Bruner, "Social Psychology and Perception," in E. Maccoby, T. Newcomb, and E. Hartley, eds., *Readings in Social Psychology* (New York: Henry Holt and Company, 3d ed., 1958).

[28] F. C. Bartlett, *Remembering: A Study in Experimental and Social Psychology* (Cambridge: The University Press, 1932).

[29] A. R. Cohen, E. Stotland, and D. M. Wolfe, "An Experimental Investigation of Need for Cognition," 41 *Journal of Abnormal and Social Psychology* 291-297 (1955).

Actual surveillance of an individual or group at a particular event, political or otherwise, is not an essential element for chill to occur. With public knowledge that surveillance of political activities has occurred and is continuing to occur, the individual's perception of the actual event has been influenced. Based on the expectation that surveillance might be going on, people exhibit the same verbal inhibitions as if they were certain through direct knowledge that a surveillance agent were present.

The need to protect oneself from being investigated, when coupled with the public knowledge that surveillance occurs at certain types of political meetings, can lead to the perception that it is occurring or will occur at a specific meeting in question. People will then respond to the meeting based not on what the actual social situation is, but on what past reality has taught them to expect it to be.[30]

When people are surveilled by the military at a demonstration and have no knowledge of the consequences of this surveillance, or of what behaviors are targeted specifically, or of who is being surveilled in particular, or of why the surveillance is being conducted in the first place, then the absence of predictability in the situation gives rise to uncertainty and anxiety. In fact, the results of studies of uncertainty and predictability have shown that individuals have a desire for predictability about a forthcoming unpleasant event, even if this knowledge will not keep the event from occurring. Not only is the predictability preferable, but it also arouses less anxiety.[31] People tend to avoid

---

[30] Bandura, *Principles, op. cit.*, 300.

[31] J. T. Lanzetta and J. M. Driscoll, "Preference for Information About an Uncertain but Unavoidable Outcome," 3 *Journal of Personality and Social Psychology* 96-102 (1966); also see L. A. Pervin, "The Need to Predict and Control Under Conditions of Threat," 31 *Journal of Personality* 570-587 (1963).

these surveilled political events because they would have little or no control over the consequences of their behavior if they attended.

Another factor influencing both the individual's perception of political activities and his behavioral response to them is what is called in psychological literature "evaluation apprehension." This apprehension is an active anxiety that subjects feel when they are being evaluated. It leads the individuals to behave in a manner that will win a positive evaluation from the person who is judging him. In the situation discussed in this case, that would be the surveillance agent. Rosenberg[32] found that evaluation apprehension could be reduced by assuring the subject that his "public spiritedness" or "patriotism" would not be open to assessment or evaluative judgment. In this way, a more accurate self representation could be obtained. Rosenberg also learned that if the experimenter has some *power* over the subject, he will bias his responses so as to appear in conformity with most others.

The psychological consequence of concern over social evaluation (induced through awareness that one's behavior is under surveillance) is the arousal of anxiety. This anxiety raises the threshold for expression of all behaviors which could be judged as non-normative, deviant, atypical, or politically dissident. The overt consequences of such an internal state of "evaluation apprehension" are:

1) a likely avoidance of such evaluative situations;

2) a limitation or modification of the public speech or actions of the individual who is in such situations, so as

---

[32] M. J. Rosenberg, "The Conditions and Consequences of Evaluation Appreciation," in R. Rosenthal and R. L. Rosnow, eds., *Artifact in Behavioral Research* (New York: Academic Press, 1969), 279-349.

to render the speech or action "acceptable" to the sponsors of the surveillance; and,

3) an arousal of feelings of shame and worthlessness by the individual who avoids such situations, if he is committed to those beliefs relevant to the situation. If he is not yet committed to the beliefs, he is likely to come to view those beliefs as illegitimate, as a direct consequence of the surveillance.[33]

Government surveillance agents can be used to enforce individual compliance to certain norms or standards of behavior. By observing and surveilling the individual or group in a situation where dissenting political speech is being displayed, the surveilling agents, who are authority figures, act as a pressure toward compliance with their own norms.[34] Kiesler and Kiesler have shown that an individual may re-evaluate not only his overt behavior because of the pressures produced by observation (surveillance), but also will reexamine his beliefs.[35] Thus, surveillance may interfere not only with verbal and other

---

[33] Cf. L. Festinger, *A Theory of Cognitive Dissonance* (Evanston, Ill.: Row, Peterson, 1957) and P. G. Zimbardo, "The Cognitive Control of Motivation," in W. J. Arnold and D. Levine, eds., *The Nebraska Symposium on Motivation* (Lincoln: University of Nebraska Press, 1969), vol. XVII, 237-307.

[34] Charles A. Kiesler and Sara B. Kiesler, *Conformity* (Massachusetts: Addison Wesley Publishing Co., 1969). In an editorial column entitled "Big Brother Is Growing" (*New York Times*, Nov. 14, 1971), Russell Baker writes:

> "The object of unconcealed surveillance is not to get the goods on its man, but to plant fear of the state in his marrow, to keep his mind sensitive to the powers that the corporate state can bring to bear, if it chooses, upon him whose existence annoys it."

[35] Kiesler and Kiesler, *op. cit.*, 86.

opinion-related behavior, but may also act as a method of thought control.[36]

In an experimental situation, Milgram[37] illustrated the ability of legitimate authority figures to enforce compliance, when he was able to get subjects to administer what they believed to be painful shocks to other people at the instruction of a perceived legitimate authority. In commenting on the amount of compliance an authority figure could command, he states:

> [I]t is the extreme willingness of adults to go to almost any lengths on the command of an authority that constitutes the chief finding of this study . . . relatively few people have the resources needed to resist authority.[38]

The military, being the agent of authority as well as the agent of surveillance, provokes the individual's fear of subsequent negative consequences. The individual's response is the result of a belief that if he complies with the powerful agent (rather than resisting the latter's attempt to influence him), he can maximize his gains and minimize his

---

[36] Jerome B. Wiesner (see below, footnote 88) has warned that the interconnecting communications hardware and new sophisticated techniques for data analysis may one day make it possible "to simulate patterns of behavior for individuals and social groups and attempt to predict or anticipate their behavior with the purpose of maintaining better surveillance. . . . In a way this was what the Army was doing when it selected antiwar organizers, speakers, and demonstrators for particular attention." See the Ervin hearings at 764, cited in full below in footnote 46.

[37] Stanley Milgram, "Some Conditions of Obedience and Disobedience to Authority," 18 *Human Relations* 259-276 (1965).

[38] Stanley Milgram, "The Compulsion to Do Evil," in *Pattern of Prejudice*, vol. 1, no. 6, November/December 1967 (London), 5.

losses in relation to the agent's ability to punish.[39] Berkowitz states that "anticipated punishment is a negative incentive which often causes the person to suppress actions that might bring about the noxious consequences."[40] Furthermore, the individual may attempt to hide his own opinions because they differ from those of the agents of power.[41]

Another body of psychological data which has a bearing on the chilling effects of surveillance comes from research on anonymity and deindividuation. Anonymity is provided by situations in which an individual perceives that his thoughts, speech, action and judgments cannot be identified by others as belonging to him. Deindividuation is the process by which individuals attempt to become anonymous or indistinguishable from others. When an individual is surveilled he loses his anonymity and attempts to deindividuate himself.

Deutsch and Gerard[42] have found that people experience less influence to conform to social norms when they are able to express their judgments anonymously, rather than when someone knows the source of the judgments. Similarly, Cantril[43] found a discrepancy between what one will say secretly in voting on a controversial issue and what

---

[39] L. Berkowitz, "Social Motivation," in G. Lindzey and E. T. Aronson, eds., *The Handbook of Social Psychology*, 2d ed., vol. III (Reading, Mass.: Addison-Wesley, 1969).

[40] *Ibid.*, 73.

[41] K. Ring and H. H. Kelley, "A Comparison of Augmentation and Reduction as Modes of Influence," 66 *Journal of Abnormal and Social Psychology* 95-102 (1963).

[42] M. Deutsch and H. B. Gerard, "A Study of Normative and Informational Social Influences Upon Individual Judgment," 51 *Journal of Abnormal and Social Psychology* 629-636 (1955).

[43] H. Cantril, *Gauging Public Opinion* (Princeton: Princeton University Press, 1944).

one will say when one is identified. Zimbardo,[44] using soldiers from the Belgian army as subjects, has shown that conditions which led the soldiers to feel more conspicuous resulted in the inhibition of their overt responses, as compared to subjects who felt inconspicuous in the situations. In another study using New York University coeds, subjects who were made to feel that they were readily "individuated," distinguishable, or conspicuous because they were under the surveillance of the experimenters, were significantly more inhibited in their interpersonal responsiveness than were individuals who felt that they were secure from identification.[45]

C. *Contemporary Awareness*

Today in the United States there is mounting concern over the government's widespread surveillance activities. Ample empirical evidence from numerous sources shows that the American public is consciously aware of these activities and especially of those involved in this suit. The congressional hearings held by Senator Sam J. Ervin in February and March, 1971[46] indicate the visibility of public concern over the system of military surveillance of citizen political activities.

---

[44] Zimbardo, *op. cit.*

[45] *Ibid.*

[46] "Federal Data Banks, Computers and the Bill of Rights." *Hearings* before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, February and March 1971, hereinafter referred to as the Ervin hearings. Also see the *Congressional Record* of September 8, 1970 for an earlier report by this Subcommittee on the extent of security and investigative files held by the Civil Service Commission and used interchangeably with other federal agencies.

The proliferation of books dealing with the "privacy debate" cannot be listed to any advantage individually, but the fact that they have been widely disseminated to the public, along with the attendant scholarly and popular magazine articles,[47] and with other media sources such as television topical coverages,[48] newspaper items, and editorials, should serve to put this Court on notice that the public *is* generally cognizant of the fact that systems of surveillance by government do exist.

In addition to this material there is other evidence of the public's consciousness of surveillance and record-keeping. Since this society is one which sociologically could be termed "organizational," interactions between individuals and organizations most often involve recorded transactions.

---

[47] For an extended bibliographical listing, see the materials in Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967). Also see Arthur R. Miller, *The Assault on Privacy: Computers, Data Banks and Dossiers* (Ann Arbor: University of Michigan Press, 1971). For more specific activities of the House Internal Security Committee, see the disclosures by Representative Robert Drinan in the *Congressional Record*, April 29, 1971, where he says that HISC holds 754,000 files on individuals and groups, which are available to any Congressman upon request with absolutely no ban on publication of any file so acquired.

[48] A CBS-TV network documentary entitled "Under Surveillance," was broadcast December 23, 1971, and was seen by millions of viewers. It dealt with the government's investigation of political dissidents in Philadelphia, and concluded that the surveillance was "political surveillance in the sense that it is directed mostly at those who disagree with the government. But in private and public files there are dossiers on most of the rest of us as well."

The ABC-TV network broadcast a one hour documentary on surveillance on January 8, 1972, entitled "Assault on Privacy." It too was seen by millions of viewers, and concluded: " . . . our rights, our freedoms, our constitutional guarantees, the result of human thought and centuries of struggle, must be protected whether threatened by overzealous law enforcers or by mechanical brain. . . . But today in the United States of America there is a clear and present danger that they can prevail over us."

As a result, individuals have become oriented very early in life to making or maintaining a "good record," or sometimes to avoid if possible making any record at all (as is clearly the point with police records).[49]

The knowledge of what is now occurring[50] and the manner in which people today perceive the situation is strikingly similar to that which was reported by Jahoda and Cook[51] in 1952. When conceptualizing the contemporary events as belonging to the class of stimuli "surveillance," individuals also conceptualize the relationship between what surveillance is and other classes of events related to it, particularly the sanctions and penalties to which it may lead. As Jahoda and Cook stressed, the sanctions and penalties may not be officially administered, but still are

---

[49] Generally, see Stanton Wheeler, ed., *On Record: Files and Dossiers in American Life* (New York: Russell Sage Foundation, 1965).

[50] The *scope* of what is occurring is a factor of the public's knowledge. Today, the FBI, the Secret Service, the House Internal Security Committee (HISC), the Bureau of Customs, the Passport Division, the Internal Revenue Service, the Intelligence Division of the Post Office, the Immigration and Naturalization Service, the Department of Justice, the National Science Foundation, the Housing and Urban Development Department, the Department of Health, Education and Welfare, and numerous State and local agencies conduct extensive intelligence operations which affect the lives of millions. HISC, to cite a specific example of the use to which such information may be put, has published a list of "radical" campus speakers and their affiliations, presumably as warning to innocent universities. But Judge Gerard A. Gesell of the Federal District Court in Washington has barred its publication or distribution because of the inescapable conclusion that the report sought to inhibit free speech. See the *New York Times*, October 29, 1970. Arthur Miller has estimated that the average American may be the subject of anywhere from ten to twenty dossiers. See the Ervin hearings, *op. cit.*, 9.

[51] See *supra*, footnotes 10-12.

the direct results of indirect administrative measures. Individuals modify their behaviors in accordance with their perceptions of the possible negative outcomes.

Recognizing this, noted historian Henry Steele Commager has advised that this nation must concern itself for its welfare, and has warned that "we may be witnessing, even now, a dissolution of the fabric of freedom that may portend the dissolution of the Republic." [52]

Clearly, some sectors of the public are responding to this threat, in part through a growing awareness of the dangers involved. This awareness has been documented in several relevant surveys, and the simple statistical results are very revealing. For example, one 1970 national sample survey on public reactions to computer uses[53] reports that 53% of the sample believed that computerized information files might be used to destroy individual freedoms, and 58% felt that computers will be used in the future to keep people under surveillance. Thirty-eight per cent believed that computers represent a real threat to personal privacy. Ninety-one per cent of those questioned felt that computers were used to compile information files on U.S. citizens, and 54% believed that these files were maintained for surveillance of activist or radical groups. People also indicated their general concern (62%) over the types of information being kept, and 45% said that political activity records should not be kept.

---

[52] *Look* magazine, July 14, 1970.

[53] "A National Survey of the Public's Attitudes Toward Computers," published by and available from the American Federation of Information Processing Societies, Inc. (AFIPS) and TIME, Inc. (New York: November 1971).

Another survey[54] measured 56% of the respondents as being opposed to the creation of any primary national data bank. Forty-three per cent of respondents felt that already the government knew too much about their personal lives. Representative David R. Obey of Wisconsin has reported[55] that of nearly 10,000 constituents who responded to his questionnaire, 56% strongly feel that surveillance of the political activities of private citizens and public officials by military intelligence personnel should not be allowed to continue. This very lawsuit reflects precisely this public consciousness and sentiment.

This evidence is supported by another statement of concern which has manifested itself in the executive realm. A concise statement found in the Report of the White House Conference on Youth reads:

> There is a feeling among youth of an abrogation and diminution of civil rights in the United States, particularly with reference to . . . surveillances by various government agencies of the activities of politicians, political candidates, and politically active citizens, and those considered radical (whether to the left or the right of the political spectrum).[56]

In addition, the Conference indicated its concern over "a chilling effect that has resulted in a feeling of fear and intimidation among the youth, minorities, and a significant number of people in this nation and members of both houses of the United States Congress."[57] The chilling effect arises,

---

[54] "A Survey of Public Attitudes Toward Technology," as reported in the *Sixth Annual Report* of the Harvard University Program on Technology and Society (December 1970).

[55] *Congressional Record*, October 20, 1971, E11080.

[56] *Report of the White House Conference on Youth, 1971*, 169.

[57] *Ibid.*, 171.

according to the Conference Report, because of "political surveillance of citizens who express themselves by engaging in protesting public policies." [58]

At a recent labor union conference in Washington, D.C., on various aspects of privacy, a hundred participants were surveyed and the results have a significant bearing on the issues at hand.[59] Almost half of the respondents felt that the Administration wanted to suppress dissent, while another 40% felt that the Administration's aim was to discourage dissent. The respondents clearly evidenced concern about the atmosphere in which political dissent can take place.[60] The participants opposed surveillance measures by law enforcement agencies in general, and especially by the Army.[61] Of the participants, 74% were opposed to the collection of political intelligence by Army Intelligence.[62]

The respondents opposed permitting the law enforcement agencies, on their own discretion, to collect and maintain files on groups which might engage in criminal acts of violence. However, a majority supported such efforts if a court issuing a warrant had judicially recognized that a group might engage in criminal acts.[63] In essence, the respondents felt that the maintenance and collection of investigative files was a legitimate aspect of the law enforcement agency if the scope of the files were limited by direct

---

[58] *Ibid.*

[59] "Conference Report of the Transportation Institute of the AFL-CIO," from the Spring 1970 Washington D.C. Conference on "The Privacy Battlefield," published by and available from the AFL-CIO (New York: Fall 1970).

[60] *Ibid.*, 7.

[61] *Ibid.*, 3.

[62] *Ibid.*

[63] *Ibid.*, 2.

court mandate. Almost all the respondents supported the maintenance of records by law enforcement agencies about persons convicted of criminal offenses.[64]

These data indicate that opposition to collection of information on a discretionary basis is not directed to the maintenance of materials needed for organizational functioning, as long as the need is perceived as meeting a legitimate function (as the court warrant served to certify legitimacy, for example). In terms of their personal experiences with surveillance, 26% asserted that they had been photographed at political meetings or rallies, and a significant minority (16%) felt that some governmental file had been opened on their political activities. Finally, 76% would oppose law enforcement officers photographing people attending public protest meetings and rallies.[65]

Morris Janowitz has testified recently[66] about the cause of this consciousness by the public about military surveillance systems:

> . . . the scope and intensity of surveillance of civilian institutions and groups is unprecedented in American society. [467]
>
> . . . it is again my reasoned judgment that [this activity by the military] raises issues about civil liberties and freedom of speech. It chills people. . . . [469]

---

[64] *Ibid.*

[65] *Ibid.*, 6.

[66] See the Transcript of Proceedings Before Hon. Richard B Austin in the U. S. District Court, Northern District of Illinois Eastern Division, *A.C.L.U. et al.* v. *Westmoreland et al.*, vol. 2 December 29, 1970. Also see several books by Janowitz, including *The Professional Soldier* (1960), *The Role of the Military in th Political Development of New Nations* (1964), and *The New Mili tary* (1967). Janowitz is Chairman of the Department of Sociolog at the University of Chicago.

The public has also become aware of the unauthorized distribution of information obtained through surveillance. An example of public knowledge of misuse of information collected can be found in New York State Controller Arthur Levitt's public statement[67] that the State's Identification and Intelligence System permitted unauthorized military personnel to search its records, and gave almost unlimited access to its confidential files to any state employee in any of its 3600 user agencies.

In New York City, Investigation Commissioner Robert K. Ruskin recently suspended, with much public notoriety, a police detective on charges that he had sold confidential information from police files to banks, airlines, detective agencies and other companies.[68] Similarly, in an affidavit Police Commissioner Patrick V. Murphy of New York City acknowledged that his department had passed information, gathered by undercover police agents, about the political and protest activities of applicants for admission to the Bar to the Committee on Character and Fitness of the First and Second Judicial Departments of the Appellate Division of the State Supreme Court.[69]

Even the Justice Department in this instant case has conceded that abuses occurred in connection with the military surveillance system. Assistant Attorney General (now Mr. Justice) Rehnquist, testifying in his former capacity as an Assistant Attorney General, indicated that it would

---

[67] "Levitt Says Study Shows State's Intelligence Agency, With Data on 4 Million People, Is a Peril to Rights," *New York Times*, December 13, 1971, p. 15.

[68] "City Says Detective Sold Data in Files for $10,000 Yearly," *New York Times*, May 21, 1970. For related developments, see the *New York Times*, November 23, 1970.

[69] See the *New York Times*, January 19, 1972, at p. 41: "Police Scrutiny of Radicals Rises: Murphy Discloses Increase in Secret Surveillance."

indeed be "surprising if there were not isolated examples of abuses of this investigative function." [70] The misuses which Mr. Rehnquist admitted included collection of information not legitimately related to law enforcement authority, and unauthorized dissemination of information in the surveillance files.

Mayor Joseph L. Alioto of San Francisco has publicly charged that certain confidential information, which formed the basis of a 1969 *Look* magazine article, had come illegally from the data files of six Federal agencies and two California police departments.[71]

Most recently, the Internal Revenue Service has acknowledged (under pressure of public charges by a former FBI agent) that it has a special investigative unit which collects information on political dissidents for special investigation of their returns.[72] As was nationally publicized by a story on the front page of the *New York Times*,

> . . . the IRS investigators explained they had assembled files on "antiwar people and draft-card burners and black militants." They said they were preparing to open investigations on all of them, but were just getting started and were not sure where they were going. . . .[73]

---

[70] See the Ervin hearings, *op. cit.*, 602. Also, see the Newark (N. J.) *Evening News*, March 9, 1971, where the lead front page story under a four column headline announced: "U. S. Aide Admits Snooping Abuses."

[71] Ervin hearings, *op. cit.*, 492-530. See also the *New York Times*, March 4, 1971, p. 22.

[72] "I.R.S. Team Collects Data on Extremists for Tax Use," *New York Times*, January 13, 1972, pp. 1, 20. Also see the *New York Review of Books*, vol. 12, no. 1, pp. 12-18, cited *supra* in footnote 16.

[73] *New York Times*, January 13, 1972, p. 20.

Moreover, Mr. Johnnie Walker, Commissioner of Internal Revenue, said "that he did not know much about the special IRS unit's operations because the existence of the unit came to his attention only about a week ago. . . . ." [74]

There is apparently no question but that interagency use of data in one agency's files is a common practice which is not even remotely regarded by user agencies as a form of abuse and misuse. Nevertheless, it is *exactly* that in the eyes of the public. In reflection of this attitude, Representative Robert Drinan of Massachusetts has disclosed that the staff of the House Internal Security Committee has obtained from IRS the tax returns of citizens whose political activities they are reviewing and recording.[75]

The fear of misuse of information contained in files has provoked various protective moves by different groups. In academia, for example, some years ago Dean Carl W. Ackerman of the Columbia University School of Journalism announced he would no longer cooperate with federal, state or police investigators seeking information on students, except upon written request and on advice of counsel:

> Students are "tried" secretly without their knowledge and without an opportunity of explaining or defending their records before employment by any governmental agency.[76]

It is now an accepted principle of academic freedom that no lists of membership of campus organizations should be

---

[74] *Ibid.*

[75] Drinan, *op. cit.*, see footnote 47 *supra*.

[76] *New York Times*, April 4, 1953.

kept by college authorities. Some schools allow graduating students the right to examine personal records and remove references to clubs and other activities.[77]

D. *Impact of Awareness*

The effects of surveillance in academia on political expression have been extensively documented. A classic sociological study, *The Academic Mind*,[78] examined the effect of the measures taken against academics during the McCarthy era on their feelings, subjective experiences, and expectations. The authors constructed an index of apprehension, which consisted of two sets of items—one pertaining to worry about security, the other pertaining to precautionary behavior.[79] The index clearly showed that certain portions of the social science community had been affected.

Herbert Kelman states that *The Academic Mind* illustrates how, by increasing the level of apprehension, the overt behavior of dissenters is inhibited.[80] He notes that those subjected to the pressures of the McCarthy years tended to "disengage themselves from legitimate activities

---

[77] See, for example, the University of Minnesota "Recommendations Derived from the Admissions and Records Experience" (996); "Recommendation on Administrative Accountability" (999); "Files Policy" (999); "Policies of the Student Counseling Bureau Regarding the Release of Information About Students" (1002); and others similar, all cited in the Ervin hearings, *op. cit.*

[78] Paul F. Lazarsfeld and Wagner Thielens, *The Academic Mind* (New York: Free Press, 1958).

[79] *Ibid.*, 74.

[80] Herbert Kelman, *A Time to Speak: On Human Values and Social Research* (San Francisco: Jossey-Bass, Inc., 1968), 287. Kelman is Cabot Professor, Department of Social Relations, Harvard University.

and associations"[81] because these associations were regarded with suspicion by others.

An analogous situation exists today. The University of Minnesota is a case in point.[82] Military Intelligence began a systematic surveillance of campus activities and personnel in 1967 and this surveillance became publicly known. The fear of being surveilled, according to Malcolm Moos,[83] President of the University of Minnesota, hung like "a deadly mist"[84] over the campus community.

A necessary consequence of this high level of apprehension is the resulting change in the political actor's orientation to political phenomena. The University of Minnesota's administration is gravely worried about the effect which this surveillance has had on the quality of academic and political expression on the campus. Eugene Eidenberg,[85] assistant Vice President for Administration at the University, stressed in his report on military surveillance to President Moos that some faculty members who might privately dissent may well refuse to express this dissent publicly, for fear that the item might be recorded and later used against them.[86]

It is this fear, this apprehension created by the knowledge that extensive surveillance has occurred, which changes the quality of orientation of the actor to his political behavior. This indiscriminate surveillance "detracts

---

[81] *Ibid.*, 288.

[82] See the Ervin hearings, *op. cit.*, at 531-569, 990-1021.

[83] Moos was also formerly a political science advisor to President Eisenhower.

[84] Ervin hearings, *op. cit.*, 535.

[85] Eidenberg is also a professor of political science at the University of Minnesota.

[86] Ervin hearings, *op. cit.*, 551.

from the democratic fabric of our society, destroys mutual trust, and chills"[87] the political behavior of those on *any* campus.

The apprehension is widespread through all levels of academia. In recent testimony, Jerome B. Wiesner has said that

> . . . many, many students are afraid to participate in political activities of various kinds which might attract them because of their concern about the consequences of having a record of such activities appear in a central file. They fear that at some future date, it might possibly cost them a job or at least make their clearance for a job more difficult to obtain. . . .[88]

Whether the intelligence gathering unit intends in a specific situation to stigmatize the political actor is irrelevant. The actor's fear is based on reality. Wiesner and Moos note that "they are real fears and that they frequently have caused students to back away from activities which attract them."[89] The activities to which they refer are not violent, planned confrontations or demonstrations, but rather include those activities clearly within the bounds

---

[87] *Ibid.*, "Statement of the Members of the University of Minnesota Task Force on Military Surveillance," 992.

[88] Ervin hearings, *op. cit.*, 765. Wiesner is provost-elect at the Massachusetts Institute of Technology, and in the past was President Kennedy's science advisor. Moos and Wiesner reiterated this same point in a recent article by S. Kossen, "Students Fear U. S. Snooping," *News American*, March 12, 1971. Also, see Richard Flacks, *Youth and Social Change* (Chicago: Markham Publishing Co., 1971) at p. 2, where he cites the fear by students that "joining anything 'might' jeopardize the government job I'm planning to get' " or the "fear that taking any kind of stand on any issue might get you into trouble."

[89] Kossen, *op. cit.*

of what have traditionally been defined as *legitimate* political and/or academic behavior (i.e., participation in seminars or political study groups, where participants might subject governmental policies to criticism). The evidence of fear indicates that the process of redefinition has already begun to occur, so that what has been legitimate in the past is now tainted with illegitimacy because of governmental surveillance, and political participation is affected.

Blacks and other minorities have had direct experiences with surveillance. The close watch kept over Dr. Martin Luther King by the FBI and the military while he was alive, even when he was buried, and when the Poor People marched after his death—these and other similar instances have fed what some observers see as a profound fear today among Blacks of surveillance.[90]

Military surveillance of legitimate political behavior creates an apprehension on the part of actual or potential actors which arises from (1) the question of the legitimacy or illegitimacy of engaging in this behavior, and (2) the fear of misuse of the information gathered. The dis-

---

[90] One account of such reactions was offered by a former member of the Army's Counterintelligence Analysis Branch. He was discussing domestic military surveillance on a TV program called "Black Talk" while before an entirely Black audience:

> "The first person to get up asked me about the existence of a plan for the genocidal extinction of blacks through the use of military forces. I was about to dismiss my questioner's fears, perhaps casually, when I realized that his question had electrified the entire audience. After trying to convince him that I believed we had no Hitlers in our military and government, the rest of the audience began expressing their fears. These people believed that the Army must have a terribly malevolent intent in collecting this information and there was no dissuading them. . . ."

See the Ervin hearings, *op. cit.*, 257-258, 275.

engagement, both behavioral and psychological, which Kelman identified in the context of the 1950s, is occurring today. Evidence cited indicates that many Americans have redefined as illegitimate or stigmatizing what is, and remains by present democratic political norms, legitimate political expression and behavior.

Even certain decisions of federally elected officials seem to be affected by the various surveillance and record-keeping systems that abound, and by the fear of misuse which arises. Many members of Congress admit privately that the dossiers maintained by the FBI and other national security agencies are a principal factor in the reluctance of their colleagues to challenge the practices and budgets of the FBI and the House Internal Security Committee (HISC). Representative Drinan, a member of HISC, has confirmed on public record that such dossiers on Congressmen do exist.[91]

Representative Abner J. Mikva of Illinois, who was himself (as was brought out in public disclosure) the subject of a political intelligence file developed by the Army, agrees with Senator Ervin that "The objection to this program is not that a U.S. Senator may have been subjected to surveillance, or that a special file was or was not kept on him. . . . The harm comes rather when the ordinary citizen feels he cannot engage in political activity without becoming a 'person of interest,' without having his name and photo placed in a file colloquially, if not officially, labeled 'subversive'."[92] But Representative Mikva continues to add,

---

[91] *Congressional Record*, April 29, 1971.

[92] Ervin hearings, *op. cit.*, 89.

> . . . who can say that in future months or future congresses there will be none who will have second thoughts about a vote on military affairs? Who can be certain that his judgment will not be swayed, perhaps even unconsciously, by the belief that he is being watched? Even the possibility of surveillance raises the specter of subtle political interference. The scenario might go something like this. Those who speak out strongly in opposition to the policies of those in power are subjected to precautionary surveillance by the military. Constituents learn that their elected representative is under Army surveillance. The inference is made, either explicitly or implicitly, that he must be doing something wrong, or at least questionable, and that suspicion will be evident in the next election results. After all, who wants to be represented by a man who is so disreputable that the Army feels that the national security requires that his activities be monitored . . . it is entirely likely that some elected officials will exercise greater caution than they otherwise would in speaking their minds in order to be sure that their political future is not imperilled by a military spy.[93]

The knowledge of the consequences of surveillance leads to these "second thoughts," these unconsciously altered judgments, this "greater caution" that threatens to reduce social and political dialogue. The public's fear of surveillance is rooted in the knowledge of the costly impact it has had on the communities of scientists, entertainment figures, labor groups and workers, and Blacks, among others.

Because science has become an instrument of national policy, scientists have learned either to be cautious about their political associations, or to accept being watched as potential loyalty or security risks. A study by Walter Gell-

---

[93] *Ibid.*, 137.

horn[94] of the untoward consequences of McCarthyism on scientists reported that the system of political and speech accountability had been misused to such an extent "that the atmosphere of suspicion surrounding scientists in government was an effective deterrent to procurement and use of their services."[95] Fewer scientists enlisted in public service because they felt compelled to avoid the uncertain situation where intelligence information could be misused against them.

> In the field of science, the crudities of the loyalty program discourage efforts to draw into public service the live-minded and experienced men whose talents are needed in many agencies. The distress occasioned by an unwarranted inquisition by a loyalty board is felt by a wide circle of friends and fellow-workers. Especially in the case of scientists there is a realization that even after a man has been exonerated following a hearing, he may still be subjected to a renewal of the charges and a dusting off of the same evidence if the winds of politics continue to blow strongly. . . . What [eight of America's great scientists] said publicly has been echoed privately by scientific men of every level of eminence.[96]

Political surveillance in the past has ruined careers and haunted the lives of many in the entertainment world. Private groups and public legislative bodies combined their investigative techniques against an industry which (they accused) tolerated political deviants. Under the threat of

---

[94] Walter Gellhorn, *Security, Loyalty and Science* (Ithaca: Cornell University Press, 1950). Gellhorn is Professor at the Columbia University School of Law.

[95] *Ibid.*, 158.

[96] *Ibid.*, 157-158.

denunciation and boycott, the entirety of the entertainment industry in the late 1940's altered its usual course of conduct, and purged its own house of those suspected of unorthodoxy. Blacklists of all who would not cooperate with legislative inquiries were established, and many entertainers went underground or left the country. Others broke relations with their families and friends.[97] Many survived, but only by naming names and pledging to stay clear of politics. Actress Judy Holliday, testifying before the McCarran Committee in 1952 about her support of Henry Wallace for President in 1948, summed up the "greater caution" which investigated subjects feel: "I don't say 'yes' to anything now except cancer, polio, and cerebral palsy, and things like that." [98]

Surveillance was a recognized fact of life also in early union activities. Company tactics, including labor spies and informers whose authority derived from the standing threat of industry-wide blacklisting, and harassment by police and citizen front groups have in the past been employed to intimidate union organizers and other potential union members in the textile, mining and other industries. Companies threatened to close plants, to lay off workers, and even to move main plants if workers supported any "outside" agitation for unionization.[99] Use of the surveillance tech-

---

[97] See the relevant literature, *supra* in footnote 1. Also, Millard Lampell, "I Think I Ought to Mention I Was Blacklisted," *New York Times*, August 21, 1966, for a personal account.

[98] *New York Post*, September 24, 1952.

[99] Abundant documentation can be found in the Senate LaFollette hearings and the more recent investigations of labor-management relations by Congress and by the National Labor Relations Board. The NLRB has interpreted corporate surveillance of worker activity in union elections and collective bargaining as intimidating and therefore the cause of injury. See, e.g., *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

nique in this situation labeled unionists as a deviant group *per se*; and discouraged (and retarded) the growth of associations which today are regarded as unquestionably legitimate.

E. *Conclusions*

The foregoing materials demonstrate that people today are indeed chilled in their political participation, in their speech, in their associations, and in their right to petition for redress of grievances, and that this chill results in large part from the system of military surveillance of legitimate civilian political activities.

To suggest, as the government does, that Plaintiffs' allegations of chill are "imaginary and speculative" is to blind oneself to truth and to deny the reality of what "all others can see and understand." *Bailey* v. *Drexel Furniture Company*, 259 U.S. 20, 37 (1922).

The societal consequence of surveillance was well described by Judge Learned Hand during the McCarthy era:

> God knows, there is risk in refusing to act till the facts are all in; but is there not greater risk in abandoning the conditions of all rational inquiry? Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where nonconformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become

so timid that we dare not enter our convictions in the open lists, to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any we dread; and they can be allayed only in so far as we refuse to proceed on suspicion and trust one another until we have tangible ground for misgiving. The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion. I did not say that these will suffice; who knows but we may be on a slope which leads down to aboriginal savagery. But of this I am sure: if we are to escape, we must not yield a foot upon demanding a fair field and an honest race to all ideas.[100]

[100] Learned Hand, *The Spirit of Liberty* (New York: Knopf, 3d ed., 1960), 216.